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THE CAESARS AND THE STARS (II)[1]

III. *Astrologers and Their Clients: State Trials of the Later Principate* (50-205 A.D.)

IN 11 A.D. Augustus forbade divinatory inquiries about anyone's death. He also outlawed in the same edict divinatory consultations *à deux* about any subject.[2] Tiberius reaffirmed this edict.[3] In an earlier article the legal interpretation of this edict has been traced.[4] Between 11 and 49 A.D. a number of state-trials demonstrated the evolution of a new concept of *maiestas* indictments: forbidden consultations with astrologers and other diviners came to be looked upon as *prima facie* evidence of treason whenever the death-date of the emperor, or finally even of any member of his family had been the subject of such inquiries. With the trial of Lollia Paulina in 49 A.D. this formative period of legal interpretation came to an end. From then on, as will be shown, the courts of the principate adhered firmly to this legal concept.

Although we can but rarely find evidence of trials of astrologers or other diviners—clearly in each case involving a guilty client there must at least have been one guilty prophet—, a few instances of this kind have been transmitted and will be discussed. Complete silence reigns, on the other hand, about the prosecution of the overcurious and their divinatory advisers outside the small group of ranking Romans involved in

[1] This article was made possible by successive grants of the Social Science Research Council and the American Philosophical Society.

[2] Cassius Dio, LVI, 25, 5.

[3] Suetonius, *Tiberius*, 63, 1.

[4] *Seminar*, IX (1951), 1-35.

state-trials during the principate. There can be no question of the general application of the Augustan edict to all levels of society in Rome and elsewhere. For Roman jurists of the authority of Ulpian and Paulus attest that at the very end of the principate the topical restrictions imposed in 11 A.D. were still enforced.[5] From these sources it also becomes clear why no evidence of such lesser trials has survived: Only the inquiries about the emperor and his family, punishable as treason, were sensational enough to arouse the interest of historians, and that only in cases involving prominent people in Rome. Forbidden inquiries about the fate of lesser men were punished less severely, except in the case of slaves investigating the death-date of their present masters.[6] So far no evidence of such trials has apparently been unearthed. Nine cases of high-ranking Roman transgressors, however, and five in which their divinatory advisers were tried for violation of the edict of 11 A.D. will illustrate the legal practice of the later principate in such matters.

	Date	*Defendant*	*Indictment*	*Verdict*	*Penalty*
(i)	52	Furius Camillus Scribonianus and his mother	*maiestas*	guilty	exile, probably exile
(ii)	53	T. Statilius Taurus	*maiestas?* impiety, *repetundarum*	guilty? guilty guilty?	suicide before the verdict; property confiscated
(iii)	54	Domitia Lepida	*maiestas*	guilty	death
(iv)	66	Barea Soranus and daughter Servilia	*maiestas*	guilty	death
(v)	66	P. Anteius and Ostorius Scapula	*maiestas*	guilty	death
(vi)	89?	Mettius Pompusianus	*maiestas*	guilty	exile
	96?		*maiestas?*	guilty?	death
(vii)	136	Pedanius Fuscus	*maiestas*	guilty	death
(viii)	189?	Septimius Severus	*maiestas*	not guilty	none
(ix)	205	Popilius Pedo Apronianus	*maiestas*	guilty	death

[5] Ulpian, *de officio proconsulis*, VII in *Legum Mos. et Rom. collatio*, 15, 2, 1-6; Paulus, *Sententiae*, V, 21, 1-3.

[6] Paulus, *Sententiae*, V, 21, 3.

Stretching over more than one hundred and fifty years, this list shows clearly that the law of topical and technical restrictions of astrology and other forms of divination was enforced throughout the principate. It may be added that even during the first century of latter-day despotism, i.e. from Diocletian (284-305) to Valens (d. 378), the Augustan edict of 11 continued to be enforced.

Case (i)

The biblical word of the sins of the fathers that will be visited upon the children came true in the trial which in 52 A.D. enmeshed Furius Camillus Scribonianus and his mother, Vibia (?). His father, who had reached the consulate in 32,[7] had rebelled against Claudius earlier in the reign. For this he had paid with his head.[8] His wife Vibia (or Junia ?) had been banished. Small wonder therefore that she and her son looked forward hopefully to the death of the elderly ruler. Although apparently neither of the two engaged in actual conspiracy, they had sought the confirmation of their cherished hopes by astrological consultations about the death of Claudius. This was a clear and flagrant violation of the Augustan edict of 11 A.D. which forbade all inquiries about the death of anyone. Moreover when the prince's death had been the topic, legal practice by now had established this to constitute the crime of *maiestas*. The fact that Furius was descended from Pompey was, under the circumstances, an aggravating factor. Descendants of Pompey, when indicted, inevitably evoked in imperial and pro-imperial minds of the first century A.D. the memories of the bitter civil war between Pompey and the founder of the Julio-Claudian dynasty.

That astrological consultations alone were the crime of the two defendants may be surmised from the sentence which, even Tacitus had to admit, was a relatively mild one in view of the aggravating antecedents of the case. Claudius was satisfied with seeing Furius banished—nothing is known about

[7] Tacitus, *Annals*, VI, 7.

[8] *Ibid.*, XII, 52; compare *Histories*, I, 89; Suetonius, *Claudius*, 35, 2.

the mother's punishment—but the exile did not survive long. Death from natural causes seemed, as usually under such circumstances, too unlikely to the contemporaries. Therefore the customary suspicion was voiced, i.e. that Furius had perished by poison.[9] Although this trial had failed to reveal an actual plot, it focused the government's attention once more upon the dangers of inflammatory astrological predictions concerning the death of a ruler, i.e. an impending change of the government. So seriously did the senate view the situation in 52 that it passed (soon after the trial) a "harsh though ineffectual" expulsion decree, banishing all astrologers from Italy.[10]

Case (ii)

The next victim of Agrippina, indicted of *maiestas* on the main ground of occult practices or forbidden consultations, was T. Statilius Taurus in 53 A.D.[11] Agrippina's psychological predilection of using this particular charge for ridding herself of her enemies casts a revealing light on her own character. Not a single state-trial involving such charges was recorded for the eight years of Claudius' reign prior to her marriage to him, while from the five years of their joint lives no fewer than four such accusations are known, each involving a special interest of Agrippina. Could it be that her family's belief, surely inculcated in all her children by the older Agrippina, that Germanicus, father of Agrippina the younger, had been murdered by black magic,[12] had heightened such fears of

[9] Tacitus, *Annals*, XII, 52. A Phrygian inscription (*CIL*, III, suppl. I, 1, p. 1271, no. 7043; suppl. II, p. 2316, 22, no. 14192, 3) may refer to him (or his brother); see Groag in Pauly-Wissowa's *Realencyklopädie* (=*RE*), VII (1912), 351, no. 50. Agrippina's main motive may have been her fear that Furius might become a rival of her own son Nero for the throne.

[10] Compare F. H. Cramer, "Expulsion of Astrologers from Ancient Rome," *Classica et Mediaevalia*, XII, 1-2 (1951), 29-31.

[11] The second charge, alleging *repetundae*, was apparently a mere formality; see Tacitus, *Annals*, XII, 59.

[12] *Ibid.*, II, 69-72.

her own, fears which in any case were common among even the most educated Romans of her time? Forbidden consultations to her, then, might mean more than the purely "scientific" investigation of somebody's future death date. They could, in her opinion, almost automatically lead towards the use of black magic to ensure the desired death.

So far as Statilius Taurus was concerned, his real crime seems to have been his magnificent gardens, coveted by a Roman Jezebel, Agrippina. Of noble stock—his father had been consul in 11 A.D., his mother apparently was a daughter of Valerius Messala Corvinus [13]—, he himself had reached the consulate in 44 A.D.[14] As proconsul he became governor of Africa,[15] probably in 52. A certain Tarquitius Priscus, strong partisan of Agrippina, served under him, perhaps already under secret instructions to spy on his superior and to obtain material on which to indict him. A trumped-up charge of *repetundae* after the return of Statilius to Rome proved hollow. But when years later Tarquitius himself was accused of this crime, he was enthusiastically convicted and punished by the senate.[16] This fine fellow then proceeded to accuse Statilius of magic superstitions (*magicas superstitiones*).[17] Not long ago a subterranean sanctuary, dedicated to some unknown mystic cult, perhaps the worship of Mithras, has been discovered in what seems to have been part of the property of the Statilian family in Rome. The assumption that this sanctuary may have been connected with the magic rites in which Statilius was accused to have participated, was of course ad-

[13] See Nagl in *RE* (2. Reihe), III (1929), 2205-7, no. 37; compare V. Scramuzza, *The Emperor Claudius* (Harvard Historical Studies, XLIV), pp. 97f.; 263f., n. 59f.

[14] Cassius Dio, LX, 23, 1.

[15] Tacitus, *Annals*, XII, 59.

[16] *Ibid.*, XIV, 46.

[17] *Ibid.*, XII, 59. A modern theory, perhaps too finely spun, suggests that Taurus' trial was the result of his stubborn refusal to sell his gardens to the government (which wanted the land for an aqueduct). The baffled emperor through secret agents then ascertained the reason of Taurus, i.e. the existence of the secret underground shrine on this terrain.

vanced almost at once,[18] but it remains doubtful whether Statilius (even if he partook of the ceremonies at this shrine) could be accused of *maiestas* on those grounds.[19] According to Tacitus, the entire indictment was a fabrication.[20] A strongly pro-government modern historian, on the other hand, has taken the view that the suicide of Statilius prior to the verdict was an admission of guilt.[21] To attribute his trial and ruin to Claudius' campaign against foreign cults, however, seems wholly unwarranted in the absence of any corroborating evidence besides the existence of a mysterious subterranean sanctuary on Statilian property. Ironically enough, Statilia Messalina, in all probability the daughter of the luckless owner of the too beautiful gardens, subsequently in 66 A.D. married Agrippina's son and murderer, Nero, after he had rid her of an inconvenient husband by the simple device of slaying him in 65.[21a]

Case (iii)

The extension of the scope of *maiestas* indictments for forbidden consultations concerning the imperial family was reflected in the trial of Domitia Lepida in 54 A.D. The defendant was accused of having attacked Agrippina's life by means of black magic and of spreading unrest throughout Calabria through her numerous slaves banded together in that part of Italy.[22] To what extent forbidden inquiries were part

[18] In 1918 (*Not. Scavi*, pp. 39-52) by E. Gatti and F. Fornari.

[19] For more recent literature on the matter, see V. Scramuzza, *op. cit.*, p. 264, n. 62.

[20] Tacitus, *Annals*, XII, 59.

[21] V. Scramuzza, *op. cit.*, p. 97.

[21a] Suetonius, *Nero*, 35, 1; Tacitus, *Annals*, XVI, 63. Otho, ex-husband of Statilia's predecessor, Poppaea Sabina, wanted to marry her (Suetonius, *Otho*, 10, 2) after Nero's death. His taste and that of Nero seem to have been quite akin. Statilia was an exceptionally well educated woman; see *Schol. Juven.*, vi, 434: she had developed "usum eloquentiae usque ad usum declamandi"; compare *RE* (2. Reihe), III (1929), 2209f., no. 45.

[22] Tacitus, *Annals*, XII, 65: "obiecta sunt quod coniugem principis devotionibus petivisset, quodque parum coercitis per Calabriam servorum agminibus

of the *devotiones* with which Domitia was charged cannot be ascertained, but that some violation of the law of 11 A.D. had taken place can hardly be doubted.

The character of the accused was not without blemish. Tacitus called her as shameless and infamous as Agrippina.[23] She had successfully weathered three husbands. From the first one she had a daughter, Messalina of unholy memory. Among Messalina's many misdeeds seems to have been her support of the fatal charges against her own stepfather Silanus, Domitia's second husband. He was executed in 42 A.D., perhaps because he had rejected his stepdaughter's amorous advances.[24] The irate Domitia thereupon broke formally with her daughter even at the risk of thereby offending her imperial son-in-law Claudius. Not that Domitia herself could have been particularly surprised at her daughter's behavior. For rumor had it that Domitia had been more than a sister to her own brother, Cn. Domitius Ahenobarbus, Agrippina's husband and father of the future emperor Nero.[25] When Agrippina was sent into exile by her mad brother, the emperor Caius Caligula, Domitia Lepida in 40 A.D. had taken Agrippina's three-year-old boy into her own household. The charge that the aunt neglected the education of her little nephew—she is said to have turned him over to a dancer and a barber as tutors[26]—cannot be taken seriously. For Claudius, immediately after coming to the throne in January 41 A.D., recalled Agrippina from her exile. Her son, soon afterwards returned to her, was then barely four years old. Domitia Lepida's somewhat unorthodox educational methods surely could not have wrought irreparable harm during the short interval.

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pacem Italiae turbaret"; compare Suetonius, *Nero*, 7, 1. See on her Groag in *Prosopographia imperii romani* (*PIR*), III (2nd ed.; 1943), pp. 56f., no. 180.

[23] Tacitus, *Annals*, XII, 64.

[24] Cassius Dio, LX, 14, 1-4; 15, 1; compare Suetonius, *Claudius*, 29, 2; Tacitus, *Annals*, XI, 29; Seneca, *Apocolyntosis*, 11, 3.

[25] Suetonius, *Nero*, 5, 2.

[26] *Ibid.*, 6, 3-4.

From that time on, however, a protracted struggle began between the two women who competed for the boy's affections, a struggle which seems to have lasted until the very time when Domitia was brought to trial. The catastrophe which overtook Domitia's daughter Messalina in 47, may have led to a momentary armistice. So far as Messalina was concerned, Domitia received her doomed daughter and tried in vain to persuade her to kill herself rather than be executed.[27] Although she could hardly condone her daughter's misdeeds, Domitia must have seen with some bitterness Agrippina succeed in Messalina's place as the wife of Claudius. What seemed even more galling was the ascendancy of young L. Domitius whom Agrippina groomed relentlessly for the succession. Although hereditary monarchy was by no means accepted during the principate,[28] Domitia may well have entertained some hope that her own grandson, Britannicus, whom Messalina had born to Claudius, might eventually succeed his father.[29] That her granddaughter Octavia was married to Agrippina's son in 53 A.D.[30] would of course be some consolation, but on the other hand made her all the more eager to resume her deadly rivalry with Agrippina over the boy's affections. The long struggle between the two women had now become an important political issue: With Claudius failing rapidly, the one who would control the young and seemingly pliable Nero would in fact wield the supreme power when Claudius died and Nero mounted the throne.

In this tense atmosphere it is more than likely that Domitia Lepida engaged in forbidden consultations about the future.

[27] Tacitus, *Annals*, XI, 37.

[28] Only Titus, Domitian, and Commodus were sons succeeding their father in the two centuries from Augustus to the death of Commodus (d. 192); compare Scramuzza, *op. cit.*, pp. 91f.

[29] Schiller (*Nero*, Berlin, 1872, p. 87) considered this aspiration of Lepida as the real reason for her being destroyed by Agrippina; Groag, however, disagrees with this hypothesis, *RE*, V (1905), 1511-13, no. 102.

[30] Tacitus, *Annals*, XII, 58; the marriage seems to have almost coincided with the trial of Statilius Taurus.

On the other hand, Agrippina might well fear to become the target of black magic as her father believed he had been. The indictment for *maiestas* in 54 A.D. resolved the long feud. Domitia Lepida was sentenced to death.[31] Claudius died soon afterwards, whether by the tender ministrations of his wife Agrippina or from natural causes need not concern us. Nero became emperor. Five years later the shades of Lollia Paulina, Statilius Taurus, Domitia Lepida, and a host of others were avenged, when Nero ordered the murder of his mother.

Case (iv)

With the accession of Nero in 54 A.D. Agrippina, her life's ambition realized, apparently refrained from instigating further state-trials involving charges of forbidden consultations or black magic. Nero himself resorted to accusations of this kind only during the period following the Pisonic conspiracy of 65. Among the mass trials of real or imagined culprits, two dealt with *maiestas* charges based on forbidden consultations or magic practices. The one was launched against Barea Soranus and his daughter, Servilia, the other ruined P. Anteius and Ostorius Scapula. Barea Soranus had been *consul suffectus* in 52.[32] Thereafter he had been appointed governor of Asia, an office which he held before 63, perhaps in 61-62. During his tenure he offended Acratus, an influential freedman of Nero, by resisting his attempts to strip the province of pictures and statues, probably for Nero's collections in Italy. Towards the provincials Soranus behaved with clemency and beneficence.[33] He now was caught up in the dragnet of the purge undertaken after the discovery of Piso's plot in 65.

From the account of both Tacitus and Dio (although Dio ascribes the trial of Soranus to 65, Tacitus to 66) it seems that Soranus was prosecuted simultaneously with the Stoic leader

[31] The brief Tacitean account (*Annals*, XII, 64-65) is packed with details and permeated with innuendo.

[32] Tacitus, *Annals*, XII, 52; compare Henze in *RE*, III (1899), 12, no. 2.

[33] Tacitus, *Annals*, XVI, 23.

of the senatorial opposition, Thrasea Paetus.[34] Dio relates these events, at least in the extant epitome, as directly following the death of Seneca and Seneca's brothers. Ostorius Sabinus, a Roman knight, acted as prosecutor of Soranus and of his daughter,[35] a task for which he was handsomely rewarded with a quaestorship and a million and two hundred thousand sesterces.[36]

According to Tacitus Soranus was accused of *maiestas* for (1) his friendship with the luckless Rubellius Plautus, dead since several years, and (2) intrigues to lure his province—long relinquished—into thoughts of revolt.[37] Dio, on the other hand, merely knew that "Soranus was slain on the charge of having practised a kind of magic through his daughter."[38] Even if not a formal part of Soranus' indictment, this accusation, levelled against his daughter, whose conviction it caused, must also have been used to blacken Soranus before the senate. This is evident from the report of the trial: "There was a fresh charge involving the daughter in the peril of her father, to the effect that she had lavished money on *magi*."[39]

These *magi* unquestionably were diviners, perhaps astrologers.[40] The charge against Servilia was true, as even Tacitus admits. He adds as extenuating circumstances that she had engaged in these forbidden consultations "with the thoughtlessness of youth"—she was only nineteen years old—and out of affection towards her father.[41] Her offense, whether or not

[34] Tacitus, *Annals*, XVI, 21ff.; Cassius Dio, *ep.* LXII, 26, 1.

[35] Tacitus, *Annals*, XVI, 23.

[36] *Ibid.*, XVI, 33.

[37] *Ibid.*, XVI, 23 and 30.

[38] Cassius Dio, *ep.* LXII, 26, 3; Tacitus, *Annals*, XVI, 30ff.

[39] Tacitus, *Annals*, XVI, 30.

[40] W. J. Jackson (Modern Library ed., p. 414) translates *magi* as *astrologers*; but see E. Tavenner, *Studies in Magic from Latin Literature* (New York, 1916), pp. 1-12, esp. 10f.

[41] Tacitus, *Annals*, XVI, 30.

inspired by her father, was a violation of the edict of 11 A.D. For the topics about which she had consulted the *magi* were (1) *de incolumitate domus,* i.e. on the future fate of her own family, and (2) whether Nero would possibly relent.[42] The first and second topic were clearly related, but the first one, although a violation of the edict of 11 A.D., was no basis for a *maiestas* indictment, since only the death (or salvation) of *private* persons had been inquired about. The second topic, however, involved political issues and could therefore, though very tenuously, be construed as *maiestas.* Dio, actually, relates that father and daughter "when Nero was sick had offered a certain sacrifice."[43] His, or his excerptor's vagueness implies that either divination by sacrifice and magic, or even black magic may have been the crime imputed to Soranus and Servilia.

Although allowances must be made for the anti-imperial bias of Tacitus, his vivid evocation of the dramatic scene enacted before the senate rings essentially true. He would absolve both defendants of the charge of having used black magic against Nero:

> "When the accuser asked her whether she had sold her bridal presents[44] or stripped her neck of its ornaments to raise money for the performance of magic rites, she at first flung herself to the ground and wept long in silence. After awhile, clasping the altar steps and altar, she exclaimed, 'I have invoked no impious deities, no enchantments, nor aught else in my unhappy prayers, but only that thou, Caesar, and you, senators, might preserve unharmed this best of fathers. My jewels, my apparel, and the signs of my rank I gave up, as I would have given up my life-blood had they demanded it. They must have seen this, those men before unknown to me, both as to the name they bear and the arts they practise. No mention was

[42] "an placabilis Nero"; *loc. cit.*

[43] Cassius Dio, *ep.* LXII, 26, 3.

[44] Her husband, Annius Pollio, had recently been punished with exile; Tacitus, *Annals,* XVI, 30.

made by me of the emperor, except as one of the divinities. But my most unhappy father knows nothing, and if it is a crime, I alone am guilty.' "[45]

From this it would seem that the young woman had, indeed, trafficked with *magi,* be it to have their more potent prayers and rites soften Nero's heart—which would constitute the practice of magic on him—, or to ascertain whether or not fate had decreed the death of Soranus.

Soranus thereupon demanded from the senate that he should be tried separately for the accusations brought against him, but that his daughter should only be tried for acts of misguided filial devotion.[46] A Stoic philosopher, P. Egnatius Celer, a client of Soranus, became one of the two most damaging crown witnesses.[47] A native of Berytus, he had become a professor of philosophy. As a Stoic he must have been especially convinced of the value of astrological predictions. It seems even that it was he who induced his pupil Servilia to undertake the forbidden consultations.[48] Apparently he and the wealthy Bithynian, Cassius Asclepiodotus, were named as co-defendants with Soranus, but by turning state's evidence against his patron, Egnatius Celer saved himself, while Asclepiodotus, steadfastly refusing to admit any guilt on his part or on that of Soranus, was convicted, sentenced to exile and stripped of his entire property.[49]

The simultaneous trials of Thrasea, Soranus, and Servilia ended with the expected conviction of all three defendants. As befitted their rank they were permitted to choose their way of dying. This they did, committing suicide rather than fall

[45] Tacitus, *Annals,* XVI, 31.

[46] *Ibid.,* 32.

[47] *Loc. cit.*: compare *Histories,* IV, 10 and 40.

[48] Juvenal, iii, 116; *Schol. Juv.,* i, 33. That Soranus was, in the fashion of Roman noblemen, making Celer a client and kept him as a family tutor in his house is well established. About Servilia's connection with him compare *Schol. Juv.,* vi, 552.

[49] Tacitus, *Annals,* XVI, 33.

into the executioner's hands.[50] From the conviction of Asclepiodotus it would seem that Soranus was found guilty of the charge of stirring up disloyalty in his former province. In all probability the secret consultations of the *magi,* even though they had been transacted by his daughter, were assumed to have taken place with his knowledge and consent. The death sentence resulted. Against Servilia no other charge was brought. The fact that she too was sentenced to death would imply that the evidence against her was damning. Forbidden consultations and the use of black magic combined to ruin her. To tamper with the edict of 11 A.D. out of political curiosity had become a capital crime long ago. The fate of Servilia was meant to be another warning lesson to malcontents.

Case (v)

In the same year, shortly before the trials of Thrasea, Barea Soranus, and Servilia, two men were condemned after the most summary kind of a trial, held not before the senate but apparently by Tigellinus, Nero's praetorian prefect, and Nero himself *in camera.*[51] The two defendants were P. Anteius Rufus and M. Ostorius Scapula. Their indictment was, as usual, for *maiestas,* and the entire evidence stemmed from the carefully preserved files of an Egyptian astrologer by the name of Pammenes. They were accused (1) of planning a coup, (2) of having engaged in forbidden consultations about their own future, as well as that of the emperor.[52] Both men belonged to the highest stratum of Roman society. Anteius' brother may have been the one slain immediately after Caius

[50] The *Annals* break off at XVI, 35 in the midst of Thrasea's slow suicide. Unquestionably the two other victims, Soranus and Servilia, having received the same kind of death sentence (XVI, 33), also chose suicide in preference to execution.

[51] To be inferred from Tacitus, *Annals,* XVI, 14, where Tigellinus advised Anteius not to delay the making of his will and, when no one dared to witness the document of the doomed man, himself authorized it.

[52] *Loc. cit.*: "imminere rebus et sua Caesarisque fata scrutari."

Caligula's assassination,[53] while he himself escaped such a fate and rose to the rank of pro-praetorian legate of Dalmatia in 51/52.[54] He was promised the governorship of Syria in 55, but was retained in Rome on some pretext [55] while the court-astrologer Balbillus, who at the same time had been appointed as prefect of Egypt, safely departed for his province.[56] Whether or not the two men were more closely acquainted than could be expected from their inevitable social contact is not known, but P. Anteius most certainly was a fervent believer in astrology. When one of his personal astrological advisers, the above-mentioned Pammenes, was sentenced to exile, Anteius continued to keep him in his pay and proceeded to consult him from afar.[57]

He was not the only one to deal with the exiled astrologer. Among others M. Ostorius Scapula also seems to have been one of Pammenes' clients. It is possible, however, that Anteius, in looking for a possible successor to Nero, merely forwarded to Pammenes the horoscope of Scapula for further investigation in the belief that Scapula might be imperial timber.[58] In view of his record this could not be ruled out. As the son of P. Ostorius he had accompanied his father, who commanded the Roman army in Britain at the time (about 50 A.D.), and was awarded a civic crown for saving a citizen's life.[59] His bodily skill and his robust constitution supported his reputation for military prowess demonstrated in Britain.[60]

[53] Josephus, *Antiqu. Jud.*, XIX, 1, 15 (end).

[54] *CIL*, III, 1, p. 310, no. 1977.

[55] Tacitus, *Annals*, XIII, 22.

[56] Except for Stein and a small minority there is general consensus about the identity of Balbillus the astrologer and Balbillus, prefect of Egypt, 55-59; on him see *PIR*, II (2nd ed.; 1936), no. 812, p. 184; no. 813; pp. xxi and 184f.

[57] Tacitus, *Annals*, XVI, 14.

[58] On his name, see *CIL*, VI, 1, p. 484, no. 2042, 33; compare Groag in *RE*, XVIII, 2, 1 (1942), 1670, no. 3.

[59] Tacitus, *Annals*, XII, 31; compare XVI, 15.

[60] *Ibid.*, XVI, 15.

In 59 Nero, still under the influence of Seneca and Burrus, made him *consul suffectus* during the second half of that year.[61] His personal intrepidity was again demonstrated when he came forward to save Antistius Sosianus. In 62 Antistius, then praetor,[62] was accused of "literary treason"; he was said to have recited some libelous verses he had written about Nero while dining at the house of Ostorius. The prosecutor was none other than Cossutianus, son-in-law of the all-powerful Tigellinus. Although witness after witness testified against the defendant, Ostorius, the host of the ill-fated dinner-party, insisted that he had heard nothing of Antistius' alleged declamation. His attempt to save the accused failed, however, but—this being the first *maiestas* case of the reign—the senate was satisfied with a sentence of exile and the confiscation of Antistius' property, to which Nero grudgingly gave his assent.[63]

Four years later Antistius was still on the island to which he had been banished. It happened to be the same one to which the astrologer Pammenes had been deported. Unmindful of any considerations of gratitude but only eager to rejoin his boon companions at Rome, Antistius conceived a scheme which might achieve the revocation of his sentence: he had become aware of the intense correspondence and the ties which bound Pammenes to P. Anteius, whom he knew to be disliked by Nero and wealthy enough to make an attractive victim. He filched from the files of the astrologer the horoscope af Anteius and Pammenes' predictions of his patron's future career. At the same time Antistius also laid hands on the horoscope of Ostorius Scapula and its interpretation by Pammenes. He now did not hesitate to recommend himself to the emperor by denouncing both men—and indubitably the astrologer also—to Nero, accusing them of planning a revolt

[61] He was, as proven by a wax tablet found in Pompeji, in office on July 10; *CIL*, IV, suppl. 1, p. 391, no. 143; compare *CIL*, VI, 1, p. 484, no. 2042, 33.

[62] For his behavior while *tribunus plebis* he had been severely criticized.

[63] Tacitus, *Annals*, XIV, 48ff.

and of forbidden consultations. If brought back to Rome he would divulge all details. His plan succeeded to perfection: some ships were sent out and he was rushed back to the capital.[64] Surrendering his documents and implementing them probably with lurid inventions of his own, he reaped his reward: He was permitted—apparently without a formal pardon—to remain in Rome. Two years after Nero's death, however, it was remembered that Antistius was still under formal sentence, and he was sent back to his island exile.[65]

In the meantime, however, P. Anteius had long paid the price of his imprudent violation of the edict of 11 A.D. From the scant record it is impossible to judge whether he had actually gone beyond inquiring whether his own and Scapula's horoscopes predestined their possessors to rise to the zenith of power. This evidence alone would probably have been sufficient to condemn him, especially since it came to light in the panicky atmosphere prevailing after the discovery of Piso's plot. If the Anteia who married the Stoic leader Helvidius Priscus was, as has been suggested,[66] a daughter of Anteius, he would have belonged to the circle around the Stoic Thrasea Paetus, whose destruction followed on the heels of Anteius' ruin.[67] After at best a summary trial *in camera,* Anteius was told to make his will at once. Perhaps even without the formality of a sentence he was given the usual choice between death by suicide and the public executioner. Anteius took poison, but when it proved too slow, severed his veins and thus ended his days.[68]

Ostorius, on the other hand, did not even receive an opportunity to answer in person to the charges against him. He

[64] Tacitus, *Annals,* XVI, 14.

[65] Tacitus, *Histories,* IV, 44.

[66] v. Rohden in *RE,* I (1894), 2349, nos. 4 and 5; see Pliny, *epist.,* IX, 13, 4.

[67] Tacitus, *Annals,* XVI, 21ff.; Suetonius, *Nero,* 37, 1; Cassius Dio, *ep.* LXII, 26, 1ff.

[68] Tacitus, *Annals,* XVI, 14.

happened at the time to live on one of his estates in Liguria. Even allowing for Nero's fears of facing the intrepid, physically powerful defendant, whose popularity and military reputation might arouse great sympathies at the capital, one must assume that the incriminating evidence from Pammenes' files was overwhelming proof of Scapula's complicity in Anteius' enterprise. A centurion was hurriedly sent from Rome to Scapula's Ligurian domicile, surrounded the house with guards, entered, and informed Ostorius Scapula of his fate. A choice of the method of dying being allowed him, the fearless victim stabbed himself to death after having severed his veins.[69]

The entire affair revealed how deeply Rome's ranking men were influenced by astrological advice in contemplating the gravest matters like revolt or plotting for the throne itself. Conversely, Nero, himself wholly convinced of the likely accuracy of astrological predictions,[70] knowingly challenged fate by executing those caught in such forbidden consultations. For a believer in fatalistic astrology this was illogical, since no one, after all, could escape his fate; but then, who is logical when facing mortal danger! Two years later Nero too was dead and Galba, whom the stars had long promised the throne,[71] succeeded him.

Case (vi)

The reign of Vespasian seems to have remained free from *maiestas* trials based on forbidden consultations. This may in part have been due to Vespasian's serene faith in astrology. Surrounded by the most renowned astrologers of his time, men like Thrasyllus' son Balbillus and Otho's erstwhile chief astrologer Ptolemy Seleucus,[72] he may have felt so absolutely cer-

[69] Tacitus, *Annals*, XVI, 15.

[70] For example Suetonius, *Nero*, 36, 1 and 40, 2.

[71] Cassius Dio, LVII, 17, 4; already Augustus had been credited with this prediction.

[72] Compare Tacitus, *Histories*, I, 22; II, 78; Suetonius, *Otho*, 4, 1; 6, 1; Plutarch, *Galba*, 23, 4; Juvenal, vi, vv. 557-559; Stein in *RE* (2. Reihe), II (1923), 1248, nos. 29 and 30.

tain of his sons' succession[73] that he considered *maiestas* prosecutions as superfluous if only forbidden consultations were charged. This attitude he carried so far as to make a man like Mettius Pompusianus consul, although this senator was reliably reported to possess "an imperial horoscope." Warned of this "danger," Vespasian, believing Pompusianus harmless, refused to proceed against him in any way whatever.[74] Said the emperor: "He will surely remember me and will certainly honor me in return."[75] This imperial leniency seems to have made Pompusianus even more cocksure of his future grandeur. He carried about with him and studied the speeches of kings and famous generals, excerpted from the works of Livy.[76] He also openly displayed a map of the world, which according to Suetonius he also carried about with him,[77] while Dio relates that it was painted on the wall of his bedroom.[78] Since Dio's account of this case is, even in the extant epitome, more detailed than that of Suetonius, it can be assumed that he used not only Suetonius, but also another source than that whence Suetonius drew his own information.

Titus (79-81) continued his father's lenient policy towards violators of the law of topical restrictions,[79] but Domitian, a fanatical believer in astrology, lacked this easy-going attitude. Sometime after his accession he seems to have arraigned Pompusianus for his breach of the Augustan edict of 11 A.D. Indicted for *maiestas,* Mettius Pompusianus was found guilty (as he undoubtedly was) and was sentenced to banishment in Corsica.[80] But when after the rebellion of L. Antonius (89/

[73] Suetonius, *Vespasian,* 24-25.

[74] *Ibid.,* 14; Cassius Dio, *ep.* LXVII, 12, 2-3.

[75] Suetonius, *Vespasian,* 14.

[76] Suetonius, *Domitian,* 10, 3; Cassius Dio, *ep.* LXVII, 12, 4.

[77] Suetonius, *Domitian,* 10, 3.

[78] Cassius Dio, *ep.* LXVII, 12, 4.

[79] Suetonius, *Titus,* 9, 1-2.

[80] Cassius Dio, *loc. cit.*

90) a reign of terror was ushered in by Domitian, the full rigor of the law was invoked. A man was executed for forbidden consultations with astrologers in those days.[81] Mettius Pompusianus himself fell victim to the purge. It is not certain whether a second trial had been launched against him, or whether he was merely summarily put to death in his Corsican exile.[82]

Case (vii)

The reign of Trajan is the most barren of the principate so far as historical accounts are concerned. The pens of Tacitus and Suetonius do not deal with it; the younger Pliny tells only very little. The epitome from Cassius Dio and the works of Byzantine historians are but a poor substitute for the richly flowing sources dealing with the first century of our era. The fact, therefore, that no trial involving violation of the Augustan edict has survived does not mean that in Trajan's time the government no longer prosecuted forbidden political curiosity. That there was no break in the legal continuity during the later principate is evident from three cases dating from 136, 189/90, and 204/5 respectively.[83] The first of these occurred towards the end of the reign of Hadrian and was, as might be expected, directly connected with the question of the imperial succession.

Hadrian himself had no son. His only sister, Paulina,[84] married L. Julius Ursus Servianus.[85] Their daughter—there is no record of other children—married in turn Cn. Pedanius Fuscus Salinator,[86] son of a former consul of the same name.

[81] *Ibid., ep.* LXVII, 12, 2.

[82] *Ibid., ep.* LXVII, 12, 4; Suetonius, *Domitian*, 10, 3.

[83] Cases (vii), (viii), (ix).

[84] Compare Stein in *RE*, V (1905), 1519-20, no. 108.

[85] See on him Groag in *RE*, X (1919), 882, no. 538. He was thrice consul, the last time in 134 A.D.; on his end compare A. von Premerstein, *Das Attentat der Konsulare auf Hadrian im Jahre 118 n. Chr.* (Klio, Beiheft VIII; Leipzig, 1908), p. 38.

[86] Pliny, *epist.*, VI, 26, 1ff.; also VI, 11, 1; VII, 9; IX, 36 and 40.

The match was considered a brilliant one, and Pliny, the fatherly friend of the bridegroom, congratulated his disciple's father-in-law on that occasion.[87] From this young couple the ill-starred Pedanius Fuscus was born. His birth is usually assigned to the year 118 A.D.,[88] the very year when the infant's father was consul.[89] Beyond the epitomized passage of Dio, however, no other source attests to that date. Fuscus may, indeed, have been born as early as April 6, 113.[90] At any rate, the descendants of Servianus and Paulina would be the closest relatives of Hadrian, since he had no brother and only this one sister. Under the circumstances it is hardly surprising that young Pedanius Fuscus—Paulina being his grandmother—grew up in expectations of an imperial future, although the hereditary principle was by no means generally recognized during the principate.

Direct knowledge concerning him has hitherto been confined to two brief references, one in an epitome of Cassius Dio, the other in the *vita* of Hadrian by one of the *Scriptores historiae Augustae*. Additional information, however, may be gained from a very different source.

In the second century of our era, Antigonus of Nicaea, a physician who also practiced astrology, compiled a collection of horoscopes of historical personages. Naturally these horoscopes were " verified " by the facts of the life of their owners. Three of these horoscopes—one of them being that of the emperor Hadrian—were preserved for posterity by a later excerptor of Antigonus' work, Hephaestion of Thebes (4th century). In order to illustrate certain technical, astrological

[87] *Ibid.*, VI, 26, 1.

[88] Cassius Dio, *ep.* LXIX, 17, 1 is our only authority for that date.

[89] Compare *CIL*, VI, p. 3027, no. 30881; p. 3282, no. 32374 (*Acta Arval.*); *CIG*, no. 1732a. He resigned on May 1st; see W. Weber, *Untersuchungen zur Geschichte des Kaisers Hadrian* (Leipzig, 1907), pp. 81ff.; Groag in *RE*, XIX, 1 (1937), 21-3, no. 6.

[90] *Catalogus codicum astrologorum graecorum* (= *Cat.*), VIII, 2 (Brussels, 1911), 85f., if Cumont's identification is accepted. Groag was apparently unaware of the existence of the horoscope.

details, the compiler introduced the third of Antigonus' three extant horoscopes as follows:

> "Thus it became necessary to look at the given horoscopes. And this author remembers another horoscope, a third one. He speaks of a man born so that at the age of about twenty-five he became his own destroyer and that of his parents (*πατέρων*). He was born under the following constellation . . ." [91]

Without naming the owner of the horoscope, Antigonus proceeded to present the astronomical data from which the birth-date itself could be re-computed:

> "The Sun and the horoscopal point were in the Ram (*Aries*), the Moon in Scorpion, its phase being three days after the evening rise, Mercury and Saturn in the Ram (*Aries*) towards setting in the east. Jupiter in the Fishes (*Pisces*), towards rising in the east. The lot of Fortuna, however, declined into Scorpion. There, he [i.e. Antigonus] says, the star of Mars will be the Lord of the house of such a horoscope. The Moon will be six days later in [the Lion (*Leo*)], but forty days later in *Libra* [?].[92]

[91] Printed in *Cat.* VIII, 2, pp. 85ff. from *cod. Paris. gr.* 2501, fol. 134[r].

[92] O. Neugebauer computed the date as follows:

☾ in ♏ 3rd day after evening rise,
7 days later in ♌ (cf. apparatus),
40 days later in ♎.
Lunar motion in 40 days ∝ 5 signs (+360°), thus ♎ − 5[s] = ♉.
" " " 7 " ∝ 3 " " " ♌ − 3[s] = ♉.
" " " 3 " ∝ 1 sign.
☉ and Horosc. in ♈, thus ☾ in ♉.

Hence necessary emendation: ☾ in ♉.—All conditions are satisfied for April 6, 113 A.D.: ☉: ♈ 15; ☾: ♉ 12; ☿: ♈ 6; ♄: ♈ 2; ♃: ♓ 23; ♂ approximately in ∝ 22 (cf. *Cat.* VIII, 2, 86, 12).

F. Cumont suggested (*Cat.* VIII, 2, 85, n. 1) that this horoscope might belong to Pedanius Fuscus, whom Hadrian executed shortly before his own death. The horoscope is the third in a series taken from Antigonus' collection. The first one has been identified beyond any doubt as that of the emperor Hadrian (*Cat.* VI, 67ff.; from *cod. phil. gr.* 108 (16th c.) at Vienna; see also *Cat.* VIII, 2, 82-84; from *cod. Paris. gr.* 2501, f. 132[r]). Another one, whose owner according to O. Neugebauer was born in 40 A.D., but has as yet not

> The owner of this horoscope is of a very great and far-famed family, I say so on both sides, his father's and his mother's, who are most famous, but dies a violent death. Born to great hopes this man, seemingly already approaching the imperial throne, became a conspirator (κακόβουλος) when about twenty-five years old and was slain . . . And he was executed through an accusation that he were striving for imperial rule, together with an old man of his family, who was falsely accused and this by him." [93]

The remainder of the text consists of a point by point demonstration of the astrological reasons for which the man's character and life could not but be what it was.[94] The two traditional accounts which mention Fuscus and his fate are found in Cassius Dio and in the *Scriptores historiae Augustae*. Says Dio:

> "Servianus and his grandson (ἔγγονος) Fuscus, the former a nonagenarian and the latter eighteen [*sic*] years of age, were put to death . . ." [95]

In the *Life of Hadrian* we read:

> ". . . and in order to prevent Servianus, his brother-in-law, from surviving him, he compelled him to commit suicide, although the man then was in his ninetieth year . . . and Fuscus,

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been identified, follows in both in the Viennese and the Parisian codex. It is also found in another Parisian ms., *cod. Paris. gr.* 2419 (15th c.), f. 106. The third one, however, tentatively identified as that of Fuscus, seems to have survived in only one ms. (from which it has been printed).

The chief difficulty between the known sources (Cassius Dio's epitomizers and the Hadrian *vita* in the *Script. Hist. Aug.*) and the horoscope is the divergence of Fuscus' age which Dio's epitomizers give as eighteen, while the astrological ms. unquestionably—a personal inspection assured the author of this—gives the age of the horoscope owner repeatedly as twenty-five. This, as will be shown, does not invalidate Cumont's suggestion.

[93] *Cat.* VIII, 2, 85. Whether this "old man" was Fuscus' grandfather Servianus or his great-grandfather is left to conjecture. Groag (without referring to the horoscope) believed that Servianus was Fuscus' great-grandfather; see *RE*, XIX, 1 (1937), 19-20, no. 4.

[94] *Cat.* VIII, 2, 85f.

[95] Cassius Dio, *ep.* LXIX, 17, 1.

too, he put to death on the ground that, being spurred on by prophecies and omens, he was hoping for the imperial power." [96]

Like Antigonus of Nicaea, the author of the *vita* of Hadrian clearly pointed to the involvement of Fuscus himself in forbidden consultations with " prophets " and oracular diviners.[97] It is unlikely that his grandfather Servianus, the ninety-year-old brother-in-law of Hadrian, hoped for the purple himself, but he shared his grandson's fate. The tragic events occurred in about this sequence:

(1) Young Fuscus, speculating on Hadrian's obviously approaching death, anxiously consulted astrologers and other diviners whether the sudden adoption of the ailing Aelius Verus by Hadrian in 136 might bar his imperial prospects so long anticipated.

(2) Hadrian, a fervent believer in, and practitioner of astrology, got wind of these activities, suspecting, rightly or wrongly, that old Servianus—whose disappointment about the adoption of Aelius Verus must also have been keen—was behind these forbidden activities of the young man.

(3) Young Fuscus was indicted for *maiestas,* the incriminating evidence being chiefly the flagrant violation of the edict of 11 A.D.: He had inquired about his chances of the imperial succession, i.e. about Hadrian's death as well.

(4) According to the horoscope he implicated Servianus, whose innocence was confirmed by Antigonus even more strongly than in our hitherto known records. Whether or not the parents of Fuscus also died, or escaped with a lesser punishment (exile ?) the astrologer did not reveal. At any rate it would appear from the text that Fuscus' mother, as well as his father, was still alive in 138.

[96] *SHA, Hadrian,* 15, 8; 23, 2-3; compare also 23, 8; 25, 8.

[97] *SHA, Hadrian,* 23, 2-3; compare 15, 8; 23, 8.

(5) Fuscus was clearly guilty of the charge. The horoscope says so, and the author of Hadrian's *vita* strongly suggests it. The death sentence and the complete ruin of the whole family followed.[98]

On the threshold of death himself, Hadrian thereby eliminated his brother-in-law, his niece and her husband, and his young foolish grand-nephew, a monstrous way of ending a great reign. Yet who dares to doubt that the Roman empire fared better with Antoninus Pius and Marcus Aurelius as Hadrian's heirs than it would have fared with Fuscus as Hadrian's successor!

Case (viii)

This trial is unique in that its defendant was a future emperor: Septimius Severus. Although it may safely be assumed that almost all rulers of the principate relied on "imperial horoscopes" obtained—after 11 A.D.—solely through forbidden consultations, not one of them had to stand trial for such an offense. Some, like Galba,[99] were knowingly spared by an understanding ruler, others, like Nerva,[100] were not taken seriously by an otherwise ever-suspicious emperor. Those caught in the act of forbidden inquiries or subsequently found guilty of having indulged in them were, as has been conclusively shown, treated severely, whenever political prospects of the inquirer or of the imperial house had been among the topics of consultations. Septimius Severus alone is known to have been accused, presumably of *maiestas*, for forbidden astrological inquiries about his future, and, having survived the trial, to have made good the prophecy by actually reaching the imperial throne.

[98] The only survivor seems to have been a sister of Fuscus, who may have been the wife of a certain C. Sertorius Brocchus; *CIL*, III, suppl. 2, p. 2253, no. 2253; cf. Groag in *RE*, XIX, 1 (1937), 21, no. 6. It is suggested by Premerstein (*op. cit.*, p. 38) that Servianus was driven to commit suicide by Hadrian's insulting treatment. The same may apply to the parents of Fuscus.

[99] Compare Suetonius, *Galba*, 4, 1; Cassius Dio, LVII, 17, 4 (from Xiphilinus); compare Zonaras, XI, 2; *Cat.* VIII, 4, 100, 6-8.

[100] See for instance Cassius Dio, *ep.* LXVII, 15, 5-6.

Born on April 11, 146 A.D. at Leptis in North Africa, Severus grew up in the benign era of Antoninus Pius (d. 161) and Marcus Aurelius. He became quaestor, probably at the usual age of twenty-five, i.e. about 171 A.D., and was then allotted the province of Baetica in Spain. Due to political disturbances there, however, he was sent to Sardinia instead (ca. 172) and afterwards served as legate to the governor of Africa. Although he doubtless had investigated his horoscope long ago, he seems to have consulted at about this time another astrologer. The man, it is said, foretold him accurately the brilliant future in store for him.[101] This was of course a flagrant violation of the edict of 11 A.D., punishable as *maiestas*. Under the mild rule of Marcus Aurelius, however, the legate felt probably safe. By way of the office of plebeian tribune, to which this well-affected ruler appointed him, Septimius Severus reached the praetorship in 178 at the age of thirty-one.[102] During the first six years of Commodus' reign he failed to hold public office, but after the assassination of the praetorian prefect Perennis in 186,[103] Severus emerged rapidly as one of the most influential men in the imperial service. He became governor of the Gallic province of Lyons (187/88), married,—probably in 187—the Syrian Julia Domna, whose husband, according to her horoscope, was destined to mount the throne of the empire,[104] and was recalled to Rome, probably early in 189, to be named governor of Sicily, perhaps in the same year. He was in office on July 1. At this time "he was indicted for consulting about the imperial dignity (*de imperio*) with seers and astrologers (*vel vates vel Chaldaeos*)."[105] It may well be that the charge of adultery, on

[101] *SHA, Severus*, 2, 8-9.

[102] *Ibid.*, 3, 1ff.

[103] See A. Stein, "Das Todesjahr des Gardepräfekten Perennis," *Hermes*, XXXV (1900), 528-530.

[104] *SHA, Severus*, 3, 9. Severus is said to have methodically checked the horoscopes of all prospective brides himself, cf. *ibid.*, 5, 4.

[105] *Ibid.*, 4, 3.

which he had been tried on one occasion,[106] was also brought at this time.[107] Coupling such indictments was at least a common practice.[108] Whether or not guilty of adultery, he was acquitted of this accusation.

His guilt of *maiestas* through forbidden consultations, on the other hand, was flagrant. Under normal conditions exile or death would have been the inescapable punishment. Our slender record of the trial, however, has it that " because Commodus was now beginning to be detested, he was acquitted by the praetorians of the guard to whom he had been handed over for trial." [109] The regime of Commodus' hated favorite, Cleander,[110] may have been the reason for this breach of judicial objectivity. If this were true, then Severus, who owed much to Cleander,[111] must have sensed the coming storm in which the praetorians played a leading part [112] and severed in time his ties with the doomed favorite. Be that as it may, the praetorian prefects closed their eyes, acquitted Severus and nailed his luckless accuser to a cross.[113] How fully Septimius Severus was exonerated was shown by his appointment as consul in 189/190, and in 191 as governor of the vital province of Pannonia.[114]

[106] *Ibid.*, 2, 2.

[107] This is at least the opinion of Fluss in *RE* (2. Reihe), III (1923), 1940-2002, no. 13.

[108] A combination of indictments for forbidden consultations or magic practices was for example preferred in the cases of Aemilia Lepida and Mamercus Scaurus; see *Seminar*, IX (1951), 20-23; 24-31.

[109] *SHA*, *Severus*, 4, 3.

[110] Cassius Dio, *ep.* LXXIII (LXXII), 10, 2ff.; 12, 1ff.

[111] *SHA*, *Severus*, 4, 4. This must be read in the light of Cassius Dio, *ep.* LXXIII (LXXII), 12, 4.

[112] *SHA*, *Severus*, 13, 5.

[113] *Ibid.*, 4, 3.

[114] *Ibid.*, 4, 2; the chronology of the text is completely garbled. Severus did not reach Pannonia before midsummer 191.

Case (ix)

His own lucky escape did not soften Severus' attitude towards violators of the Augustan edict. Extremely superstitious himself, he suspected others easily, especially when their high rank seemed to lend encouragement to imperial hopes. Cassius Dio was eyewitness of a *maiestas* trial held in the senate, a trial involving Popilius Pedo Apronianus,[115] then governor of Asia (205 A.D.), and a few others. Almost thirty years later Dio recalled it as being an incredible affair even to a mere listener.[116] The charges against Apronianus were: (1) His nurse had dreamt that he should be emperor; (2) He had used some magic to this end.

As had for example happened to Ostorius Scapula,[117] Apronianus too was sentenced to death while still away from Rome. Evidence against him, obtained through torture, was forwarded to the senate by Severus. One of the examiners had inquired who had told of the dream and who had heard the prophecy. The answer of the man on the rack had been: "I saw a certain bald-headed senator peeping in." [118]

Under the impact of the recent overthrow of the powerful favorite Plautianus [119] the senate, already in the midst of a drastic purge by Severus, was panic-stricken. Said Dio:

> "We found ourselves in a terrible position . . . Such was the general consternation that even those who had never visited the house of Apronianus, and not alone the bald-headed but even those who were bald on their forehead, grew afraid . . . I was so disconcerted that I actually felt with my hand to see whether I had any hair on my head . . ." [120]

[115] *CIL*, VI, Suppl. 2, p. 442, no. 1980; *RE*, XIX, 1 (1937), 45, no. 4; compare *ibid.*, II (1896), 272, no. 2; 273, no. 10.

[116] Cassius Dio, *ep.* LXXVII (LXXVI), 8, 1.

[117] See above, Case (v).

[118] Cassius Dio, *ep.* LXXVII (LXXVI), 8, 2-3.

[119] *SHA*, *Severus*, 14, 5; Cassius Dio, *ep.* LXXVII (LXXVI), 1ff.; compare also *ep.* LXXVI (LXXV), 14, 1ff.; 15, 1ff.

[120] Cassius Dio, *ep.* LXXVII (LXXVI), 8, 3ff.

Eventually the guilty (?) party was singled out in the senate: Baebius Marcellus, a former aedile. He was summarily done away with before Severus had even been informed of the death-sentence.[121] This was a violation of the legal respite of ten days between sentence and execution which Tiberius had introduced,[122] but the terrorized senate obviously wanted to impress the emperor with this zeal in his cause. From the limited information now extant it seems that Apronianus, stirred up perhaps by his nurse's dream, had proceeded to confirm it by forbidden consultations and the use of magic against Severus. This at least apparently was the flimsy legal structure of the case against him.

From 16 to 205 A.D. the legal practice molded the Augustan edict of 11 A.D. The most important clarification was the division between ordinary forbidden inquiries and " political " consultations, i.e. those aiming at knowledge about one's own political prospects and the future of the emperor or his house. By 49 A.D. such inquiries alone had come to be regarded as *prima facie* evidence of treason. Although our records concentrate on such state-trials, it cannot be doubted that lesser violations of the edict of 11 A.D. were far more frequent than political ones. Their prosecution, however, to judge from the silence of our sources, seems to have been less vigorous, or at least less spectacular. The only important exception to this relative leniency was made when slaves had consulted books or diviners about the prospective death of their masters.[123] On the other hand, even the vaguest suggestion of forbidden inquiries, dreams, or the use of magic for political ends continued, long after the principate, to be punished ferociously.

[121] *Ibid.*, 8, 6-7; 9, 1-2.

[122] Tacitus, *Annals*, III, 51; Cassius Dio, LVII, 20, 4.

[123] Compare Paulus, *Sententiae*, v, 21, 3.

IV. *Astrologers in Court for Violations of the Edict of 11 A.D.*

From its inception the Augustan edict was directed against diviners, as well as against their guilty clients. In every case in which an over-curious client was brought to trial, at least one guilty diviner must also have figured. Due to the fact, however, that all accused inquirers whose names have been preserved belonged to Rome's *haut monde* while the diviners did not, historians usually took cognizance only of the highly-placed clients' plight, while only occasionally an individual astrologer was mentioned by a historian in connection with violations of the law of topical restrictions. A pious wish for the execution of astrologers in general was voiced in the reign of Nero (54-68):

> "All those who take horoscopes from observing Mars and Saturn are deserving of one cudgelling. I shall see them perhaps at no distant date really learning what a bull can do and how strong a lion is." [124]

Such sanguinary hopes were gratified at least in part by Vitellius. In 69, he executed astrologers by the score, although it is doubtful whether this was done for their refusal to heed his expulsion edict or for publicly prophesying his impending death.[125]

That there must have been many more than the few prosecutions of individual astrologers discussed below, can be deduced from a well-known passage in Juvenal, whose exaggeration obviously contained a hard kernel of truth. Writing at the turn of the first century A.D., Juvenal jokingly asserted:

> "The faith in the art [of astrology] stems hence: Both hands [of the astrologer], the right and the left, have been clanging with iron chains, and for a long time has he been in prison. No astrologer will be considered a genius unless convicted, unless he has barely escaped execution, unless he just managed to be

[124] Lukillios in *Anthol. Gr.*, XI, 164.

[125] Suetonius, *Vitellius*, 14, 4.

sent to a Cyclade island, and to have finally languished on little Seriphus." [126]

Credulous Romans obviously reasoned that astrologers so heavily punished by the imperial government must have "known too much." These men therefore were considered especially reliable sources of astral information.

The few instances which are known of individual indictments of astrologers confirm the general picture drawn by Juvenal. Exile or death were the usual penalties in such trials. Occasionally an astrologer saved his skin by turning state's evidence. At other times the conviction of a luckless diviner was based on more than one indictment, for instance on his active support of treasonable plans:

	Date	*Defendant*	*Indictment*	*Verdict*	*Penalty*
(I)	16	L. Pituanius ⎫ P. Marcius ⎭	*maiestas*	guilty	death
			"	"	"
(II)	40/41	Apollonius	"	"	"(?)
(III)	Prior to 66	Pammenes	"	"	exile
	66?	"	"	"	exile?, death?
(IV)	69	Ptolemy Seleucus	"	"	exile
(V)	96	Asclation	"	"	death
(VI)	96	Larginus Proculus	"	"	"
(VII)	371	Heliodorus	"	state's evidence	none

Case (I)

Our only source for the trial and execution of L. Pituanius and P. Marcius is Tacitus.[127] The two men may have been astrologers or sorcerers, or possibly both. They seem to have fallen afoul of the law in connection with the conspiracy of Libo Drusus against Tiberius in 16 A.D.[128] For their fate was

[126] Juvenal, *Sat.* VI, vv, 560-564. Seriphus was one of the most dreaded isles of exile. There, for instance, the renowned orator and professor, Cassius Severus, dragged out a miserable existence till he died; see Tacitus, *Annals*, IV, 21; Jerome, *Chron., Ol.* 203.

[127] Tacitus, *Annals*, II, 32.

[128] Compare R. S. Rogers, *Criminal Trials and Criminal Legislation under Tiberius* (Am. Phil. Assn., 1935), pp. 12ff.

recorded by Tacitus immediately following his detailed account of Libo's trial. The senate in rapid succession passed two decrees against astrologers, sorcerers, and all other diviners soon after the trial.[129] Thereafter, as Tacitus stated laconically, L. Pituanius was hurled to death from the Tarpeian rock, while P. Marcius was executed outside the walls in the "ancient manner," i.e. undressed and flogged to death.[130] Their execution either was apparently due to a violation of the recent *senatus consulta,* or to their previous complicity in Libo's plot, perhaps in their capacity as diviners by astrology or magic.[131] Their part may only have consisted in supplying him with those exciting predictions which helped to turn his head, which was none too strong, in the direction of sedition.[132] If L. Pituanius and P. Marcius were, as is most likely, indicted in the catch-all form of *maiestas,* their eventual conviction could have been based, entirely or at least in part, on their violation of the Augustan edict of 11. If additional legal grounds were needed to convict the two men, such could easily be found in their being accessories before the fact, i.e. accessories to treason. Their guilt on either count can hardly be questioned. They may thus have been the first two diviners to have been formally convicted on charges involving the breach of the edict of 11.

[129] F. H. Cramer, *loc. cit.*, n. 10, *supra,* pp. 21ff.

[130] Tacitus, *Annals,* 32; Suetonius, *Nero,* 49, 2; see also *Claudius,* 34, 1; *Domitian,* 11, 2; Th. Mommsen, *Römisches Staatsrecht,* II, 1 (1st ed.), 108, nn. 7-9.

[131] This might explain their inability of exercising a Roman citizen's traditional right of *provocatio.* In extraordinary circumstances the senate had (since the late republican period) created a summary procedure eliminating this hallowed privilege of Roman citizens; compare Th. Mommsen, *Röm. Staatsrecht,* I (1st ed.) 125, n. 3 (end); J. Marquardt, *Das Privatleben der Römer* (1st ed.), 182, n. 5; R. S. Rogers, *Criminal Trials,* p. 21.

[132] They were perhaps among those who had inspired the coded notes in Libo's writing; see Tacitus, *Annals,* II, 30.

Case (II)

Towards the end of the year 40 the madness of Caius Caligula was widely known throughout the empire. In Rome as well as elsewhere, predictions about his untoward end were undoubtedly rife. Such prophecies in every single case constituted of course a capital violation of the edict of 11 A.D. An incident which happened in Egypt was probably symptomatic for the government's attitude to prosecute only those cases which tended to affect explosive local conditions. In Alexandria friction between Jews and non-Jews was well-nigh continuous. Recently, however, a series of wild and destructive riots between the two groups had occurred. At once the gentiles sent an embassy " to explain " these events to the emperor. Chief speaker for the group seems to have been Apion. The Jews, on the other hand, included among the ambassadors whom they sent to Caius for their defense the renowned scholar Philo.[133] He met, however, with little success before the irate emperor.

Soon after Caligula's assassination (Jan. 24, 41) another Alexandrinian embassy, sent by the gentiles of the city, arrived to plead, among other things, their grievances before the new ruler, Claudius.[134] At any rate it was in that period of unrest, probably in 40, that a certain Apollonius, arrested in Egypt late in 40 A.D. for having " foretold in his native land the actual fate of Caius," practiced his art in Alexandria, as well as elsewhere in Egypt.

> " For this he was sent to Rome and was brought before the emperor the very day on which the latter was destined to die, but his punishment was postponed until a little later, and in this way his life was saved." [135]

[133] He expressed himself on this mission in his *Legatio ad Caium* and in his *In Flaccum.*

[134] This embassy arrived in the fall of 41, but failed to win from the emperor a sanction of its anti-Jewish policy in spite of the support lent by the emperor's friend, the astrologer Ti. Claudius Balbillus; see *Pap. Lond.* 1912 in H. Idris Bell, *Jews and Christians in Egypt* (London, 1924).

[135] Cassius Dio, LIX, 29, 4 (from Xiphilinus).

Dio, to whom we owe the earliest record of this episode, is a somewhat suspect source in matters of this kind. For his blind faith in astrology, dreams, and other media of divination induced him more than once falsely to record events as bearing out divinatory predictions.[136] Concerning Apollonius, his story forms an amazing parallel to another one of Dio, involving under almost identical circumstances a certain Larginus Proculus at the end of Domitian's reign (96 A.D.).[137] Taking Dio's account at face value one can at least tentatively reestablish the sequence of the legal procedure.

Apollonius was arrested in Egypt. If he was a Roman citizen, he may have appealed a death-sentence imposed on him by the governor of Egypt and may therefore have been brought to Rome—as was the apostle Paul some decades later —for final imperial disposition of the case. But even if Apollonius did not possess Roman citizenship, the governor of Egypt may have thought his case of sufficient importance to send the defendant to Rome, perhaps in the hope that Apollonius, in revealing his clients, might implicate important persons; a betrayal for which Caius Caligula might be grateful. According to Dio, Apollonius faced Caius on January 24, 41, a short time before the emperor was killed. Caius, eager to attend the *Ludi Palatini,* seems to have postponed final action on the matter, but the death of Apollonius was obviously a foregone conclusion. Caligula's own death led to an amnesty by which the new ruler, Claudius, pardoned Apollonius. This defendant therefore was among the very few thus implicated to escape the usual penalty of exile or death meted out to diviners who had violated the edict of 11 A.D.

[136] Compare for example Dio's falsification of a wrong astrological prediction into a "correct" one: *ep.* LXIV (LXV), 1, 4 (from Xiphilinus) as against Suetonius, *Vitellius,* 14, 4.

[137] Suetonius, *Domitian,* 16, 1; Cassius Dio, *ep.* LXVII, 16, 2, whose version was used by Byzantine historians including Cedrenus, Xiphilinus, and Zonaras; see also *Cat.* VIII, 4, p. 100, 28ff.

Case (III)

In the age of Nero the Egyptian astrologer Pammenes, a man of no mean reputation,[138] fell afoul of the edict of 11 A.D. While the particular client involved in his violation of the law is not known, Pammenes himself was convicted of the charge and in 66 A.D. lived on an island as "an exile, widely known [for his prowess] in the art of the Chaldaeans and therefore a man enjoying the friendship of many people."[139] The astrologer, however, did not take his lesson seriously, but openly continued his astrological practice on the island, receiving for example an annual retainer from P. Anteius Rufus, a Roman client who consulted him by correspondence. This included forbidden inquiries about Anteius' own future and, apparently, also about the imperial prospects of Anteius' friend Ostorius Scapula. A fellow-exile of Pammenes, Antistius Sosianus, suspected the astrologer's renewed violation of the edict of 11 A.D. He was, however, more interested in trapping the high-ranking clients of Pammenes than in ruining the Egyptian. For Antistius hoped to win Nero's pardon by denouncing important "plotters." Having rifled the files of the astrologer he obtained sufficient evidence of forbidden consultations on political subject-matter to destroy Anteius and Ostorius.[140]

What happened to Pammenes in consequence of this exposure of his illegal activities is not known. Already sentenced to exile, he may have had another trial and, being convicted once more of habitual violations of the edict of 11 A.D., he probably was sentenced to death, mere exile having proven to be an insufficient deterrent. Although the fate of Pammenes remains thus shrouded in uncertainty, his brief appear-

[138] Compare A. Stein in *RE*, XVIII, 2, 2 (1949), 303, no. 6; W. Nestle, *ibid.*, no. 4. Stein suggests that Pammenes was the alchemist mentioned by Syncellus, I, p. 471 ed. Bonn (f. 248). In any case he was a well-known figure; see Aelianus, *Nat. Hist.*, XVI, 42.

[139] Tacitus, *Annals*, XVI, 14.

[140] Tacitus, *Annals*, XVI, 14-15; see *supra*, Ch. III, case (v).

ance on the Tacitean scene casts a revealing light on the incessant circumvention of the Augustan edict even by those for whom forbidden consultations constituted a grave personal risk.

Case (IV)

More fortunate than Pammenes was his fellow-astrologer and contemporary Ptolemy Seleucus.[141] He appears to have been sentenced to exile on more than one occasion, obviously for violations of the Augustan edict of 11 A.D. His great political influence was still remembered by Juvenal, who alluded to him in the following terms:

> "The most eminent one, indeed, of these [astrologers] is he who was several times exiled and through whose friendship and infallible tables a great citizen [Galba] perished and before whom Otho trembled."[142]

The great astrologer had visited Otho in his semi-exile in faraway Lusitania during the reign of Nero.[143] This may have been the first of his "exiles" referred to by Juvenal. His predictions not only kept Otho's courage up, but also undoubtedly influenced Otho's decision to depose Galba by a coup in 69.[144] When Otho in turn was overthrown by Vitellius and committed suicide in the summer of 69, his court-astrologers, including Ptolemy Seleucus, were of course dispersed. Whether Ptolemy was formally tried and banished, or simply fled from Vitellius even before the general purge of astrologers in Italy began in the late summer of 69,[145] cannot be determined with accuracy; but it does seem likely that

[141] On the probability that Ptolemy and Seleucus were identical, compare Stein in *RE* (2. Reihe), II (1923), 1248, nos. 29 and 30.

[142] Juvenal, VI, 557-559.

[143] Tacitus, *Histories*, I, 22; Suetonius, *Otho*, 4, 1.

[144] Tacitus, *loc. cit.*; Suetonius, *Otho*, 6, 1; Plutarch, *Galba*, 23, 4.

[145] Suetonius, *Vitellius*, 14, 4; Cassius Dio, *ep.* LXIV (LXV), I, 4; Zonaras, XI, 16.

some official action was taken against him at the time. This would account for a second exile implied by Juvenal.

Like Apollonius before him, Ptolemy Seleucus was flagrantly guilty of habitual violation of the edict of 11 A.D. Yet, like Pammenes he drew as his sentence banishment not death (if, indeed, he was individually accused at all in 69). With the fall of Vitellius and the accession of Vespasian, however, a new era of prosperity dawned for him: Like Balbillus, the son of the great Thrasyllus, Ptolemy Seleucus also was eventually chosen by Vespasian as one of his court-astrologers.[146] The apparent accuracy of his earlier predictions must have impressed the new ruler. Thus, instead of being punished for transgressions of the edict of 11, Ptolemy Seleucus was not only pardoned, but officially encouraged to continue his political prophesies.

Case (V)

This seems to be the only case in which not an ordinary practitioner, however renowned, was arraigned for violation of the edict of 11 A.D., but one of the most important scholars in the field paid the price of political predictions albeit accurate ones. His name was variously given as Ascletarion,[147] Asclepion,[148] or Asclation.[149] Repeatedly he was referred to as "far-famed."[150] His writings, usually quoted together with those of another astrologer of that period, Timaeus,[151] enjoyed

[146] Tacitus, *Histories*, II, 78. Whether or not Ptolemy Seleucus lived to face Domitian's expulsion edicts of 89/90 and 93/94 (which could again have sent him into exile) is unknown.

[147] Suetonius, *Domitian*, 15; it should be read Ascleparion; see Boissevain in *Cat.* VIII, 4, 101, n.; cf. *PIR* (2nd ed.; Berlin and Leipzig, 1933), p. 239, no. 1198.

[148] Malalas (ed. Bonn, p. 266, 14); Asclepius in the *Chron. Pasch.* (ed. Bonn, I, 68, 13); *Cat.* VIII, 4, 101.

[149] *Cat.* I, 79, 19; V, 1, 205, n. 1; V, 2, p. 49, 3; VIII, 4, 101, n.

[150] Malalas and *Chron. Pasch.*, *loc. cit.*

[151] Compare on him W. Kroll in *RE*, 2 Reihe, VI, 1 (1936), 1228, no. 9; see Pliny, *Nat. Hist.*, V, 9, 55 and XVI, 34, 82; according to Suidas, *s. v.* no. 4, he wrote a *μαθηματικά* and a treatise *περὶ φύσεων*.

a lasting reputation. Vettius Valens (ca. 150 A.D.),[152] the Anonymus of 379 A.D.,[153] and Palchus (ca. 500 A.D.)[154] named both men among their astrological sources. In the age of Justinian I (d. 565) John Lydus still drew on Asclation's writings.[155] The name itself is of Egyptian origin. Asclation would thus belong to that group of Egyptian astrologers of the first century A.D. whose reputation was empire-wide, including men like Balbillus, Chaeremon, Ptolemy Seleucus, Pammenes, and possibly Teucrus the Babylonian.[156]

Asclation was arrested, probably late in August or very early in September 96 A.D. Having banished astrologers from Rome on two previous occasions, in 89/90 and 93 A.D.,[157] Domitian—himself a fanatical believer in this pseudo-science[158]—was hardly inclined to treat flagrant violations of the edict of 11 A.D. lightly. On September 17, 96 Asclation faced the emperor, who, having received astrological warnings of his impending death (to occur on Sept. 18th) was in a harsh mood. Asclation seems to have admitted his guilt: he had dared to predict Domitian's death. The chief reason for Domitian's willingness to see the man must have been his eagerness to pry out of the doomed astrologer some information about the countless plots which, for all the severe suppression, flourished ever more around the emperor. The dramatic episode and its sensational sequel were well remembered as probably the most spectacular case of an astrologer who was paying with his life for accurate, but forbidden prophecies:

[152] For example in his *Anthologiae* (ed. Kroll), p. 329, 22f.

[153] *Cat.*, V, 1, p. 204, 22ff.

[154] *Ibid.*, I, p. 80, 15.

[155] *De ostentis*, 2 (ed. Wachsmuth, p. 6); *Cat.*, I, 81.

[156] Although W. Gundel in *RE* (2. Reihe), V, 1 (1934), 1132, no. 5 suggests that Teucrus hailed from the Egyptian town of Babylon, there is no valid reason to accept this view. He may as well have been a native of the decaying Mesopotamian city of that name.

[157] See Jerome, *Chron.* 89/90 an. 93/94 A.D.

[158] Suetonius, *Domitian*, 14, 1-4.

Cassius Dio, *ep.* LXVII, 16, 3[159]

"Some one else, also, had told Domitian on a previous occasion both the time and the manner of his death, and then, upon being asked what manner of death he, the prophet, would meet, had replied that he would be devoured by dogs. Thereupon command was given that he should be burned alive, and the fire was applied to him; but just then there was a great downpour of rain, the pyre was extinguished, and dogs later found him lying upon it with his hands bound behind him and tore him to pieces."

Cassius Dio (?)[160] (10th century ms.)

"The astrologer Asclepius came before Domitian and told him definitely that he would be slain on the next day, before the fifth hour of the day had come. The other asked him laughingly, whether he had something to predict about himself. The man then also said that he would very soon be eaten by dogs. The other, wishing to prove him a liar, ordered that he be burned chained to a stake. But when they lighted the fire, a most violent rain-storm began and extinguished the fire. And when the guards had fled on account of the vehemence of the rain, dogs came and tore him to pieces. When Domitian heard of it, he began to fear that the man had said the truth about him also. And so it turned out."

Suetonius, *Domitian*, 15

"Nothing, however, impressed him as much as the reply given him by the astrologer Ascletarius. He asked the man—who had been denounced and who admitted it, too, that he had boasted in public about what through his art he had foreseen of the future—whether he perhaps knew what end were in store for himself. And when the other confidently answered that in a short while he would be torn to pieces by dogs, Domitian gave orders to execute him, indeed, at once,[161] but also to give him a most diligent burial, in order thus to prove the falseness of his art. When this was being done, it happened that the pyre was blown down by a sudden storm and dogs tore apart the half-burned corpse. The emperor learned of the matter at table along with the other news of the day through the actor Latinus, who accidentally had seen it when passing by the place."

One can easily see why this episode impressed Suetonius and later historians. Coming as it did on the very eve of Domitian's assassination, the astrologer's correct prophecy of his own death, as well as of that of Domitian, furnished believers of astrology with splendid ammunition in their defense

[159] Cf. Boissevain, III, p. 184, 12; there is no question that Asclation was the "same one" mentioned in the *epitome*.

[160] *Cat.* VIII, 4, pp. 101, 2-12.

[161] Asclation was perhaps a Roman citizen. This might account for the planned decorousness of his end, insofar as Domitian was concerned.

of the infallible accuracy of this craft. Suetonius outlined, albeit briefly, the legal background of the case which was to end so dramatically. According to him the astrologer had publicly boasted of his discovery of the time when the emperor would die, having foretold according to Dio "both the time and the manner" of Domitian's demise. Honestly convinced of the scientific accuracy of his astrological techniques, the fearless Asclation had also applied them to ascertain the date and the circumstances of his own end. He was therefore ready to answer the emperor's question promptly. From the legal point of view the question was thus involved whether or not the Augustan edict permitted an astrologer to discover for himself at least the date of his own death. Assuming that the general ban of inquiries about anyone's death covered the case, one would have to consider Asclation's action as a violation of the law, even though in this instance only his own future had been investigated. This lesser offense in any case was completely overshadowed by the far greater one for which he had been arrested and tried.

A slight discrepancy exists between Suetonius and the other sources: The contemporary author of the *Life of Domitian* attested that Domitian ordered Asclation's immediate execution (the manner of which was not mentioned) to be followed by cremation. Asclation's ashes would hardly appeal to any dog, and the prophecy of the astrologer could thus be proven to be fallacious. Cassius Dio, on the other hand, reported that the very mode of execution was burning at the stake. The rainstorm caused the guards to flee and extinguished the blaze that had just been started. Thus Asclation, his hands tied to the stake, was alive but unable to fend off the attacking dogs when they tore him to pieces. The more detailed version of the Anonymus, perhaps more closely following Dio's original account, offered about the same description. Dio's well-known tendency to mold his account in a fashion which would demonstrate the miraculous accuracy of diviners, especially of astrologers,[162] makes his description of Asclation's death some-

[162] Compare above, n. 136.

what suspect, whereas Suetonius was in a position to name the source of his story: an eyewitness account, given by the actor Latinus. He also was aware—although without mentioning Asclation as the source—of the accurate astrological prediction of the very hour of Domitian's assassination.[163] Did Asclation perhaps know about the conspiracy? At any rate he did not betray any secrets but died proudly, consoled by his "knowledge" that Domitian too would die within twenty-four hours.

Case (VI)

On September 18, 96, the day after Asclation's execution, another prophet was haled before the emperor for a similar violation of the edict of 11 A.D. Larginus Proculus, variously described as an astrologer, haruspex, or sorcerer, had been arrested in a province of Germany for forbidden prophecies about the emperor's death. He had apparently confessed his crime, but, as a Roman citizen, possessed the right of final appeal to the emperor. Whether it was through the exercise of this privilege or by order of the provincial governor (possibly Trajan) that he was brought to Rome is uncertain. The governor may well have acted on his own initiative, knowing Domitian's passionate interest in matters of this sort. Two basic accounts are extant of this episode: Suetonius and Cassius Dio (of the latter, however, only excerpts have survived). Suetonius, without referring to Proculus by name, records the matter as a case involving a haruspex who through brontoscopy had ascertained an impending change of rulers (obviously without a precise date). Cassius Dio, on the other hand, transmits the name of the defendant and his crime, a "precise" forecast of Domitian's death: a technical achievement which only an astrologer or sorcerer was capable of, but not an augur or haruspex employing brontoscopy. The text of the pertinent passages reads as follows:

[163] Suetonius, *Domitian*, 16, 2; compare 14, 1.

Cassius Dio, *ep.* LXVII, 16, 2[164]

Larginus Proculus, having publicly announced in [one province of] Germany that the emperor would die on the day when he actually did die, had been sent on to Rome by the governor, and when brought before Domitian had again declared that it should so come to pass. He was accordingly condemned to death, but his execution was postponed in order that he might die after the emperor had escaped the danger; but in the meantime Domitian was slain, and so Proculus' life was saved, and he received 400,000 sesterces from Nerva.

Cassius Dio(?)[165]

For they say that Proculus, an astrologer and sorcerer, announced publicly in [a province of] Germany the day on which [Domitian] would die. And for this he was sent in chains to Rome, brought before Domitian, and told him to his face the day on which he would die. He, however, gave orders to guard him in chains because he wanted to witness the execution. The man, however, said: "You will not slay me. For I am not fated to die by you!" In the meantime Domitian perished.

Suetonius (*Domitian*, 16, 1):

Then early in the morning [of the day of his assassination] he examined an haruspex who had been sent him from a province of Germany and who, when asked about the meaning of a bolt of lightning, had predicted a change of rulers. He sentenced him to death.

There is no disagreement on the date of the trial (Sept. 18, 96), the charge (*maiestas* committed by forbidden divination) and the place where the offense was committed (one of the two German provinces, although which one of them is nowhere stated). On the details, however, Suetonius differs sharply from Dio's excerptors, including the Anonymus, whose assertion that Larginus Proculus was an astrologer and sorcerer contrasts with that of Suetonius who referred to him as an haruspex. The method used was described as brontoscopy by Suetonius, while the Anonymus suggested—without directly saying so—astrology or magic. Suetonius had the defendant merely prophesy a change of rulers, Dio the exact time of the assassination. Allowing for Dio's ineradicable

[164] Dio's version was used by Cedrenus, Xiphilinus, and Zonaras among others; cf. Boissevain, III, p. 184, 15.

[165] *Cat.* VIII, 4, p. 100, 28ff. and notes.

predilection for "accurate" divinatory forecasts, one is tempted to assume in this instance a similar falsification of historical fact as in the earlier case of the astrological death prophecies about Vitellius in 69.[166] Nevertheless, there is one point which might tend to corroborate Dio's version: The reward of 400,000 sesterces bestowed on Proculus by Domitian's successor Nerva. That Proculus was guilty of *maiestas* through violation of the edict of 11 A.D. was admitted by the defendant himself. A legal precedent for his subsequent pardon had been established by Claudius when, in 41 A.D., he spared Apollonius, who had committed the same crime at the end of Caligula's reign.[167] But to reward a guilty diviner, to reward him so handsomely, indeed, as Nerva did in the case of Proculus, was a novel feature. No explanation for Nerva's action is given by Dio's excerptors. Could it be that Proculus had obtained in far-away Germany an inkling of what was brewing in Rome? Had he, perhaps under torture, refused to name the man whom he believed to be Domitian's fated successor? That Domitian was deeply suspicious of Nerva is well attested. Actually he spared the old senator's life only when informed of the pitiful state of his health, convinced that he himself would outlive Nerva.[168] What secret connection (if any) existed between Proculus and Nerva will probably never be fully known, but without some previous tie between the two men the impressive financial reward would be inexplicable.

Case (VII)

Chronologically this case does not belong among the trials of the principate. It does, however, illustrate the continuity of legal practice in dealing with astrological offenders against the edict of 11 A.D. In 371 a pagan conspiracy against the

[166] Compare above, n. 136.

[167] Cassius Dio, LIX, 29, 4 (from Xiphilinus).

[168] *Ibid.*, *ep.* LXVII, 15, 5-6 (from Xiphilinus); cf. Zonaras, XI, 20.

emperor Valens was discovered. Among the diviners consulted by the plotters about the selection of an imperial candidate and the proper time for the coup of rebellion, the astrologer Heliodorus was one of the innermost circle. Arraigned for *maiestas,* apparently on a twofold indictment for forbidden astrological practices and active participation in the plot itself, he confessed his guilt. In an attempt to save his life he turned state's evidence. During the lengthy interrogations he succeeded in impressing Valens so strongly that the—ardently Christian—emperor not only pardoned him, but also made him his favorite court-astrologer, appointing the unscrupulous turncoat his grand chamberlain. But Heliodorus' fame went to his head, and his arrogance added to the already large number of enemies he had made. When an assassin succeeded in murdering the grand chamberlain, the inconsolable Valens ordered a state funeral for his court-astrologer.

The relatively few surviving instances of legal prosecution of divinatory violators of the edict of 11 A.D. belong to the same general category as the extant trials of their clients. In every case the indicted diviner was guilty of the most serious offense under that law: inquiry into the political future of a client, or of the emperor, or of the imperial family. Although our evidence is inadequate for definite conclusions, it does seem to support the following hypotheses:

(1) As men personally incapable of claiming the throne or assuming political leadership, offending diviners even in *maiestas* cases tended to receive somewhat more lenient treatment than their dangerously high-ranking clients.[169]

(2) The penalty normally imposed in such cases was either work in the mines or exile,[170] an occasional death sen-

[169] Attested by Paulus, *Sententiae,* V, 21, 1 and 3.

[170] *Loc. cit.*; on the administration of the imperial mines during the principate, see O. Hirschfeld, *Die kaiserlichen Verwaltungsbeamten* (2nd ed., Berlin, 1905), pp. 144-180.

tence being applied only when political prophecy or active plotting were involved.

(3) There is apparently no record of any trial of law-breaking diviners for lesser violations of the edict of 11 A.D. But it is certain that non-political forbidden consultations remained punishable throughout the principate.[171]

V. *Legal Restrictions of Divination during the Principate*

Astrology was but one of almost countless kinds of divination. Its scientific aspects impressed the educated upper strata of Roman society from the end of the republican era until the triumph of Christianity. Although its hold weakened towards the end of the principate when religious astrology, the sun-cult in particular, gained ground in the imperial circle, it continued—as the astrological literature attests—to exercise considerable influence among the educated at least until the end of the fourth century. The masses throughout the entire period, on the other hand, preferred less rationalistic methods. Augurs and haruspices, long discredited with the intelligentsia, continued to have a lucrative private clientele apart from their official duties. Oracular and magical methods vied with theirs for the pocketbooks of the common man. Prophecies and oracles emanated from organized cults or inspired individuals. Numerology, claiming spiritual descent from Pythagoras and "the ancients," combined "scientific" appeal with practical ease of access, a handbook of numerology being the only technical tool required even for the layman.

Augurial and haruspicial techniques possessed the blended appeal of official sanction, religious tradition, and "scientific" experience, at least for the minds of the more gullible. Magic, however, extended far beyond the realm of purely divinatory methods. The evolution of Roman law led finally to the differentiation of three types of magic: (1) Black magic, out-

[171] Ulpian, *Leg. Mos. et Rom. collatio*, 15, 2, 3; Paulus, *Sententiae*, V, 21, 3.

lawed at all times;[172] (2) white magic, chiefly of a medical character; and (3) divinatory magic.

As Cumont, among others, has pointed out, belief in magic was like faith in astrology fundamentally a quasi-scientific creed: The sorcerer believed that the precise use of the same formulae, incantations, and material ingredients would inevitably in each case produce exactly the same specific effect; a tenet which, except for the incantations, has been subscribed to by every experimental scientist in history. The legal distinction between different types of magic in Roman law was not based on the techniques involved, but on the aims of the practitioner and his client. Already the Twelve Tables contained punitive clauses against theft by magic and bewitching spells.[173] The use of drugs in medicinal magic was probably also dealt with in the Twelve Tables,[174] but no clause dealing with this topic has survived. The Latin *venenum* (equivalent of the Greek φάρμακον) originally meant both a healing drug and a poison.[175] *Mala venena*, i.e. poisons, administered with or without magical incantations, were of course outlawed.[176]

Among the numerous definitions of sorcerers (γόητες) in the literature of the principate the one given by Philostratus was

[172] Compare on the subject two doctoral dissertations: E. Tavenner, *Studies in Magic from Roman Literature* (New York, Columbia University, 1916); F. Beckmann, *Zauberei und Recht in Roms Frühzeit* (Münster, 1928; diss. 1923); and see L. Thorndike, *A History of Magic and Experimental Science*, I (New York, 1923), esp. ch. ii.

[173] *Tab.* VIII, 8a: "qui fruges excantassit..."; 8b: "neve alienam segetem pellexeris"; compare Pliny, *Nat. Hist.* XXVIII, 2, 10 and 17; 3, 41; Seneca, *Nat. quaest.* IV, 6f.; Cicero in Augustine, *De civ. dei*, VIII, 19; Apuleius, *Apologia*, 47. Weather magic, for example to conjure up hail to destroy a neighbor's crops, was included in the legal ban.

[174] Beckmann, *op. cit.*, pp. 55f. Cicero, *De rep.* IV, 12 (Augustine, *De civ. dei*, II, 9) errs probably when he assumes that the Twelve Table law (VIII, 1a and 1b) against *mala carmina* referred to libelous poetry also; cf. Pliny, *Nat. Hist.* XXVIII, 2, 17f.

[175] Gaius in *Dig.* 50, 16, 236: "Who says *venenum* must say whether it is *malum* or *bonum*. For *medicamenta* are *venena* also."

[176] For republican usage of the words, see Sallustius, *Catilina*, 11; Cicero, *Pro Cluentio*, 57, 148.

typical: "Sorcerers claim to alter the course of destiny by having recourse either to the torture of lost spirits [177] or to barbaric sacrifices, or to certain incantations and anointings." [178]

What seems to have been the first instance in which diviners by magic were singled out for legal curbs occurred in 33 B.C. when Agrippa as aedile banished γόητες as well as astrologers from Rome.[179] Although the transmitted text of the ordinance is directed against all sorcerers, the association of sorcerers and astrologers in the ban clearly points to diviners by magic, not to sorcerers in general. Black magic being outlawed anyhow, practitioners of white magic, the pharmacists of the time, could hardly be Agrippa's target. No legal reason to banish them from the capital could possibly be imagined. That left only diviners by magic for Agrippa to aim at. In 16 A.D. the Roman senate by two successive decrees expelled astrologers and other diviners from Rome. Diviners by magic were obviously included in the group. Since it was in practice often difficult to draw the line between them and the practitioners of black magic, sorcerers in general were subject to far more rigid curbs than were astrologers. The legislation of the principate on the subject has been aptly summarized by Paulus (about 200): "It has been ordained that those who know about the magic art shall be punished with the highest penalty, i.e. they shall be thrown to the beasts or be crucified. Sorcerers (*magi*) themselves are burned alive." [180]

It would be impossible to exclude diviners by magic from the ranks of those who did "know about the magic art." On the general assumption that their interest in magic included

[177] A necromancer of this kind, named M. Junius, had played an important part in revealing Libo's conspiracy in 16 A.D.; Tacitus, *Annals*, II, 28.

[178] *Apollonius of Tyana*, V, 12; compare similar definitions by writers of the second century in Ps. Quintilian, *Declamat. maiores*, 10, 15; Apuleius, *Apologia*, 26; Tertullian, *Apologeticus*, 23, 1.

[179] Cassius Dio, XLIX, 43, 5.

[180] *Sententiae*, V, 23, 17 (*ad legem Corneliam de sicariis et veneficis*).

black magic, offenders were sentenced to death in the arena or on the cross for mere theoretical knowledge alone. Practicing sorcerers were burned, a method of execution consistently adhered to in witchcraft cases through the Middle Ages and well into the so-called modern era. In fairness to the judicial spirit of the Romans one may perhaps assume that the defendant was allowed to offer proof of his innocence. If he should actually convince his judges that he knew only of white magic or magic by divination, he had a chance of escaping with a lighter penalty if any. Obviously the charge of forbidden knowledge was usually substantiated in court by the assertion that books on magic had been in the defendant's possession. The accused then would naturally deny ever having read them. Originally the great Roman principle, *in dubio pro reo,* would then operate in favor of the defendant unless his allegation could actually be disproven in court. But to forestall such attempts of escaping the harsh ban of all magical knowledge the principate ruled:

> " No one is permitted to have books on the art of magic in his possession. And he with whom such are found will be deported to an island after his goods have been confiscated and these [writings] burned in public. Persons of humble rank will be executed. [Not only the practice but also the knowledge of this art is forbidden.]" [181]

Books on magic thus fared as badly as practitioners of black magic, but it should not be assumed that the burning of books applied only to those dealing with magic. Politically objectionable literature and unauthorized oracular writings had even in the days of Augustus been committed to the flames.[182] Thus books dealing with oracular magic may well have been included among those which according to Paulus endangered their possessor and were, when confiscated, committed to the

[181] *Ibid.*, 23, 18. The bracketed sentence may have been added by a later writer; see *Fontes iuris antejustiniani* (ed. J. Baviera *et alii*), II, 410, n.

[182] See for example F. H. Cramer, " Bookburning and Censorship in Ancient Rome," *Journal of the History of Ideas,* VI (1945), 157-196.

flames, a legal practice continued into the later Roman empire. The double standard of grading penalties on the basis of higher or lower social rank was not confined of course to owners of magical literature. For example,

> "When a man has died from a medicine which was administered for the man's restoration to health, or for alleviating his condition, the one who has given the medicine is deported to an island if of higher rank (*honestior*), executed if of a lower (*humilior*)." [183]

An excerpt from book XIV of Marcianus' *Institutiones* has been preserved in the *Digest*. The passage, a parallel to Paulus' interpretation of the *lex Cornelia de sicariis et veneficis*, contains a number of references to the legal consequences of administering dangerous drugs, probably often to the accompaniment of magical prayers or incantations:

> "The fifth article of the law covers anyone who has made a drug (*venenum*) in order to kill somebody, or has sold it, or has possessed it." [184]

Under this heading druggists like the famous Locusta could be punished only for the manufacture of deadly poisons. On the other hand, those who trafficked in them or merely had them in their possession were held accountable too:

> "The penalty of this law applies also to anyone selling bad drugs (*mala medicamenta*) or merely acquiring possession of them for the purpose of killing somebody. The emphasis on *bad* drugs clearly implies that there are also some good drugs (*non mala venena*) . . . The word drug (*venenum*) thus is neutral, being applied equally to what is prepared for curing and for killing, as well as to what is called a love potion (*amatorium*). But this law takes cognizance only of any drug which causes the death of a person." [185]

[183] Paulus, *Sententiae*, V, 23, 19; compare *Dig.* 48, 8, 3.

[184] *Dig.*, 48, 8, 3, pr.

[185] *Ibid.*, 3, 1-2.

The chanting of spells during the preparation of drugs (especially amatory potions and the like) was an important part of ancient pharmacology. The specific reference of Marcianus to deadly love potions again points out that not medicinal magic as such was outlawed, but only its application to drugs which killed. So rigid was the emphasis on the effect of the drug that the intention of the druggist who had made or peddled it was considered secondary:

> "A *senatus consultum* ordered a woman to be relegated who without evil intent but as a bad example had given out a drug (*medicamentum*) for conception which had caused the death of the woman who had taken it. Another *senatus consultum* extended the penalties of this law to druggists (*pigmentarii*) who rashly gave out hemlock, sulphur, aconitum, *pityocampas, buprestis,* mandragora, and cantharids for the arousing of sexual passion." [186]

In short, the druggist's responsibility was not confined to the preparation—with or without magic—of healing drugs, poisonous or non-poisonous alike; but it was also his duty to prevent their falling into wrong hands or being administered in deadly overdoses. The complete silence about the use of magic in drug-making indicates that no legal objection was taken to this practice *per se.*

The magic art prohibited under the *lex Cornelia* as dealt with by Paulus could therefore hardly include medicinal magic. If the intent of Roman law in general was to punish only attacks upon the health and life of people, then black magic and dangerous drugs alone would have to be outlawed and even inadvertent use of them to be punished. Prophets and diviners by magic, on the other hand, were grouped together with astrologers:

[186] *Ibid.,* 3, 2-3. If drugs administered to induce conception made the druggist liable to deportation when causing accidental death, this would apply all the more to drugs destined to effect abortion.

Paulus [187]

"1. It has been decreed to expel from the city (*civitate*) prophets who pretend to be inspired by a god, lest public morale (*mores*) by human credulity be seduced into hoping for some particular thing, or lest the minds of the people, for certain, be excited thereby. And thus first offenders are flogged with rods and expelled from the city, but persevering ones are thrown into public jail, or deported, or at least banished.

3. Whoever consults astrologers, soothsayers (*hariolos*), haruspices, and seers about the health (*salute*) of the emperor or about high matters of state is subject to capital punishment. One would do better to abstain not only from [the practice of] divination, but also from any knowledge of it and any writings on it, because, if slaves have sought advice about the health (*salute*) of their masters, they are punished with the supreme penalty, i.e. the cross. Those, however, who were consulted, if they supplied an answer, are either sent to a mine or to an island."

Ulpian [188]

"1. Furthermore is forbidden the clever and obstinately persuasive fraud of the astrologers. Nor has this been forbidden to them by law for the first time in our own days, but it is a ban of old standing . . .

2. The question, however, has been posed, whether men's knowledge of anything is punishable or [only] the practice or professional use. And indeed it has been asserted in the writings of the ancients that the professional use, but not the knowledge was forbidden. It cannot be denied that later this was changed and that it did become customary [for astrologers] to practice also and to offer their services in public. This, however, came to pass by the boldness and daring of those who openly sought, and those who gave [astrological] advice, rather than because it was [legally] permitted.

3. Very often, indeed, and by almost all emperors has it been decreed that no one should involve himself in any way in anything of this kind, and in various ways those who practiced it were punished, in proportion to the kind of inquiry. For those who have sought ad-

[187] *Sententiae*, V, 21, 1, 3.

[188] *De off. procons.*, VII, in *Leg. Mos. et Rom. coll.*, 15, 2, 1-6.

> vice about the health (*salute*) of the emperor suffer either capital punishment or some other heavy penalty, but a lighter one, if they [inquired] about their own [health] or that of members of their family. Among these [diviners] the seers are also included. They too must be punished, because at times they practiced their illicit arts against the public peace and the realm of the Roman people.
> 4. There is, indeed, a decree of the Divus Pius [138-161] addressed to Pacatus, legate of the province of Lyons. Since there are many words to this rescript, I have here given this brief summary of its content.
> 5. The Divus Marcus [161-180] too relegated to the island of Syrus a seer, who during the rebellion of [Avidius] Cassius [175] had uttered prophecies and said many things as if inspired by the gods.
> 6. And, really, men of this kind must not be tolerated without punishment, who under the pretext of divine commands announce or proclaim these or assert they know them."

Allowing for the twofold process of condensation, we find the most detailed review of Roman law concerning the interpretation of the edict of 11 A.D. in the version in which the Christian compiler of the *Collatio* presented Ulpian's summary of a rescript of Antoninus Pius (while Paulus added

specific points on the treatment of offending seers and diviners). Ulpian recorded the gist of the Pian epistle:

(1) A general reference to the expulsion edict of 139 B.C.[189]

(2) A specific reference to the second expulsion decree of 16 A.D.[190]

(3) According to long-standing tradition the knowledge of astrological theories was always legal.

(4) Expulsion orders against astrologers were never formally revoked. Resumption of astrological practice in Rome and Italy [191] was therefore due to the daring of individuals rather than to a lifting of the legal ban, whose tacit lapse, however, Antoninus Pius admitted.

(5) A direct reference to the edict of 11 A.D. insisted that almost every emperor since Augustus had specifically invoked it anew against diviners and astrologers by outlawing

(a) inquiries *de principis salute,* i.e. on the (prospective) health of the emperor [and on high matters of state]; [192]

(b) inquiries about one's own future well-being and that of one's family members,

[(c) inquiries of slaves about the future health of their masters.]

(6) Penalties were graded according to the seriousness of the offense: for (5a) capital punishment or other very heavy penalties, for (5b) lighter punishment, [for (5c) death at the cross].

[(7) Guilty seers, astrologers, and other diviners were ordinarily sent to the mines or an island exile. First offenders were flogged.]

[189] Compare F. H. Cramer, *art. cit.* n. 10 *supra,* pp. 14ff.

[190] *Ibid.,* pp. 21-29.

[191] No empire-wide ban of astrological practice is recorded before the reign of Diocletian. Ulpian's anti-astrological Christian excerptor may have been responsible for the apparent generalization.

[192] Data in bracketed passages stem from Paulus.

While the knowledge of black magic was outlawed at all times, Ulpian's assertion that the theoretical study of astrology was legal throughout the era of the principate, or at least until his own time (he was killed in 228), is amply borne out by the extant record. In 16 A.D. Tiberius allowed all astrologers to remain in Rome who pledged themselves to give up practicing their craft, while practitioners were expelled from the capital.[193] Again and again by senatorial decree and imperial edict such expulsion measures were repeated, but never was there a law against studying the "scientific" influence of stars and constellations on the life of man. The writings of astrologers usually dealt freely with the technique of predicting the life-span of men from their horoscopes although the edict of 11 had prohibited the practice of making such prophecies about anyone's prospective death date. Thrasyllus for example predicted his own death;[194] his son Balbillus wrote on the subject;[195] Ptolemy Seleucus revealed to his patron Otho the time of the death of Nero and Galba, and probably Otho's own end as well.[196] Apollonius, Larginus Proculus, and Asclepiarius-Asclation faced death for such practices; but Ptolemy,[197] Vettius Valens,[198] and other astrologers of the second century felt perfectly free to write on the forbidden topic of death date predictions. A Mithras priest proudly called himself *studiosus astrologiae,* while the emperor Severus Alexander (222-235) paid state salaries to professors of astrology at the Athenaeum, the imperial university of Rome.[199] Priest and emperor thus openly evinced their interest in the public

[193] Suetonius, *Tiberius,* 36.

[194] Cassius Dio, LVIII, 27, 3.

[195] Fragments in *Cat.* VIII, 4, 235ff.

[196] Tacitus, *Histories,* I, 22; II, 78; Suetonius, *Otho,* 4, 1; 6, 1; Plutarch, *Galba,* 23, 4.

[197] *Tetrabiblos,* IV, 3 (on future royal and imperial power); III, 9 and IV, 9 (on how to find anyone's death date).

[198] *Anthologiae,* I, 3 (forecast of imperial power); II, 16 (rise to the throne); death date techniques in V, 9 and 12 (ed. Kroll, pp. 15, 17-23; 70, 32-71, 13; 235, 3ff.; 237, 8ff.).

[199] *CIL,* V, 2, 652, no. 5893; *SHA, Severus Alexander,* 27, 5; 44, 4.

knowledge of astrological theory. In general the theoretical discussion of accurate methods for predicting a man's life-span from his horoscope continued to be treated in many astrological manuals for centuries after the principate. Writings on the subject seem to have circulated freely among the reading public long after all practice of astrology was outlawed.

The last detailed discussion of the restrictions imposed by the edict of 11 A.D. upon political inquiries came from the pagan pen of Firmicus Maternus, more than a century after Paulus and Ulpian had summarized the interpretation of the law under the principate. Towards the end of Constantine I's reign (d. 337) Firmicus in his astrological treatise, *Mathesis,* the last extant Latin astrological work of pagan antiquity, warned the practicing astrologer:

> "You will, indeed, give your replies in public, and this must be told in advance to those who will inquire about information that you will pronounce with a loud voice your answers to them about whatever they may inquire, lest perhaps some question might be put to you the asking or answering of which is forbidden." [200]

The caution thus advised had probably two reasons: a traditional legal one, and another rooted in contemporary expediency. When Firmicus wrote these lines, astrology and other forms of divination were still legal, but faced increasing official hostility from a government in which Christianity, arch-foe of pagan divination, became rapidly dominant. Constantine, for example, in two decrees attacked the consultations of haruspices, repeating in one order Tiberius' ban of private consultations, while attacking in the second even public consultations of haruspices as pagan superstition.[201] Nocturnal religious or divinatory rites also became increasingly suspect.[202] Firmicus, realizing this trend, warned the astrologer:

[200] *Mathesis,* II, 30, 3.

[201] *Cod. Th.,* IX, 16, 1-2 (319 A.D.)

[202] Formally outlawed on Sept. 9, 364 by Valentinian I and Valens; *C. Th.,* IX, 16, 7; compare *Lex Visigoth.,* 7, 3; Zosimus, IV, 3, 2-3.

> "Never participate in nocturnal sacrifices, be they public or private ones! And never discuss matters with anyone in secret, but publicly, as I have said before, in front of everyone's eyes ply the practice of this divine art [of astrology]." [203]

Apart from contemporary reasons for counseling caution Firmicus stood—trained lawyer that he was—solidly on the legal basis of the edict of 11 A.D. which had forbidden consultation *à deux*.[204] The presence of third parties was clearly prescribed by Firmicus. Moreover he insisted that astrologers should warn their clients in advance that they could not expect any answers but loudly proclaimed ones. Questions violating the restrictions listed by Paulus and Ulpian should thus be forestalled, especially of course the posing of political questions. Inquiries of this kind were inevitably the more interesting for being forbidden. That they were continually made, in spite of the grave danger for client and diviner, attests the degree of confidence placed in astrological methods of divination. The great social revolution of the third century had not changed this attitude, nor had the latter-day despotism established by Diocletian curbed the insatiable curiosity of the politically ambitious. The undiminished appeal of the forbidden persisted when Firmicus composed his treatise. He therefore took special cognizance of the particularly perilous political inquiries and reminded his astrologer-readers:

> "Be careful never to give any answer to anyone inquiring about the life of the Roman emperor (*de vita Romani imperatoris*). For it is neither necessary nor permitted for us to learn anything concerning the state of the realm (*de statu reipublicae*) through nefarious curiosity. But anyone who, when asked, says anything about the fate of the emperor (*de fato imperatoris*) is both a criminal and worthy of every punishment." [205]

[203] Firmicus Maternus, *Mathesis*, II, 30, 10.

[204] Cassius Dio, LVI, 25, 5.

[205] *Mathesis*, II, 30, 4. For historical data in this work, see L. Thorndike, "A Roman Astrologer as a Historical Source: Julius Firmicus Maternus," *Journal of Classical Philology*, VIII (1913), 415-435.

This passage was clearly a paraphrase of the Augustan law of topical and technical restrictions of divination insofar as it applied to the most severely punished offense, the crime of *maiestas* through forbidden political consultations. While Firmicus instructed astrologers to refuse any answer to such inquiries, he added what amounted to a novel astrological theory by saying that it was "not necessary" to learn what the future would hold in store for the country. Blind acceptance of historical changes by the subject was the safer course, a view prevailing in any period of despotic government. Firmicus, however, disdained to use the argument of personal security. Instead—strange contradiction to the historical record—he maintained:

> "And no astrologer has ever been able to find out anything true about the fate of the emperor. For the emperor alone is not subject to the courses of the stars, and he is the only one whose fate the stars have no power to determine." [206]

This was a curious change from traditional concepts. Originally the stars had exclusively deigned to reveal the fate of rulers and empires in ancient Mesopotamia. Roman emperors from Augustus to Severus Alexander certainly believed that they, like any other human being, were subject to the power emanating from the stars and constellations. While worshipped in the eastern part of the empire as living divinities according to oriental and hellenistic traditions, they had as a rule not insisted on general acceptance of their divine status. Caligula and Domitian had tried for such recognition but had run afoul of the concerted senatorial opposition to divine monarchy.

The revolution of the third century culminated in the establishment of a new despotism, which Diocletian linked firmly to the ancient oriental concept of ruler-worship. The logical Roman mind must have been quick to perceive the astrological difficulties inherent in such a theory. Could a living

[206] *Mathesis*, II, 30, 4.

god be subject to fate? The Greeks had always believed that this was the case, but latter-day Romans may well have begun to quail at the inherent contradiction between divine omnipotence and a god's helpless subjection to fate. Firmicus seems to have been among the first to suggest a solution:

> "For since he [the emperor] is the lord of the entire world (*totius orbis dominus*), his fate is directed by the supreme god. And since the terrestrial space of the whole world is under the emperor's power, he has also been himself placed among those gods to whom the supreme divinity has entrusted the creation and the preservation of all things." [207]

(This impassioned plea was somewhat inconsistent with an earlier invocation in which Firmicus prayed to the seven planets that they might protect Constantine I and his sons.)[208] It has been suggested that this idea was borrowed by Firmicus from a hellenistic Egyptian source, possibly from the manual of Nechepso-Petosiris.[209] In Egypt at least the notion that the ruler is exempt from the control exercised by the stars might have originated quite naturally. The thesis presented by Firmicus, on the other hand, admitted the existence of an all-powerful supreme deity. The emperor himself, however, belonged to the next highest level of the heavenly hierarchy. The stars, according to Firmicus, controlled neither the supreme power nor this second-highest class of gods. The limitation of astral influence to non-imperial spheres applied equally to lesser divinities, who were powerless to reveal imperial destinies:

> "This matter disturbs the haruspices also. For whatever divinity may be invoked by them, its power is weaker; it therefore has never been able to unfold the substance of superior power which, indeed, is contained within the emperor. For all

[207] *Mathesis, loc. cit.*; for the same reason the haruspices are unable to foresee the emperor's future, *ibid.*, II, 30, 4.

[208] *Ibid.*, I, 10, 14.

[209] See K. Ziegler, "Zum Zeushymnus des Kallimachos," *Rhein. Museum*, LXVIII (1913), 336ff., esp. 343ff.

> freemen, all ranks, all rich men, all noblemen, all dignitaries, and all powers serve him. He has obtained the might of a divinity (*divini numinis*) and of immortal freedom, and is ranked in the forefront of the gods." [210]

Such incense was sweet perfume even for a pro-Christian emperor's nostrils. Let those inclined to dismiss Firmicus' rantings as empty rambling of hoary rhetoric compare these passages with some of the addresses tendered in our—presumably more enlightened—era to heads of totalitarian states. A ring of ominous similarity must be audible for those at least who have ears to hear. Aware of the possibility that his arguments might still fail to persuade a prospective client of the folly of his plan to obtain information about the emperor, Firmicus realized the dilemma in which such inquiry placed the astrologer. Should he save his own skin by denouncing a stubborn client to the authorities who held death in store for such criminals? No, said Firmicus. For a true astrologer was a man both priestly and humane:

> " Therefore, I do not want you to frighten with a truculent and stern reply anyone who may have asked something about the emperor, but persuade him with learned speech that no one is able to ascertain anything about the life of the emperor, so that, the error of his mind corrected, he may, impressed by your arguments, abandon the white heat of his boldness. Nor do I want you to denounce anyone who may have inquired about something else in an evil manner, lest, when he is subjected to a death sentence on account of the illicit desires of his mind, you appear to have been the cause of his death. For this is improper for a man in a priestlike position." [211]

In short, Firmicus demanded that no astrologer should denounce violators of the edict of 11 A.D., even if their very inquiries constituted the crime of *maiestas*. Protecting his own innocence by refusing to answer forbidden questions, the

[210] *Mathesis*, II, 30, 6.

[211] *Mathesis*, II, 30, 7.

astrologer nevertheless would run a very grave risk if and when the authorities should subsequently discover that he had been approached on forbidden topical matters. Thus the astrologer's position, as conceived by Firmicus, would be on a par with that, e.g., of a Catholic priest who learns of a criminal conspiracy in hearing confession;[212] or of a physician who is approached to render his professional services in the performance of a criminal act.

Actually the Augustan edict became obsolete within fifty years after Firmicus wrote his treatise. Henceforth any professional divinatory activity, not only that banned by Augustus, was strictly forbidden. Although secret consultations of astrologers about political matters continued at least until the age of Justinian I (d. 565), they were now punishable under the terms of the general, empire-wide ban of astrology and all other forms of divination. The Augustan edict of 11 A.D. therefore was chiefly important during the principate when it expressed the sum total of legal restrictions placed on divination throughout the empire. It was then the only permanently enforced curb of its kind. For the occasional regional outlawing of *all* astrological and other divinatory practices was in each instance enforced for a short while only.

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[212] The analogy is, of course, not to be understood as a historical parallel for the 4th cent. A.D., when private confession of sins was not yet the rule for canonical penance. For early texts, however, in which the Catholic doctrine of the seal of confession is adumbrated, compare B. Kurtscheid, *The Seal of Confession* (trans. A. Marks, St. Louis-London, 1927), pp. 42ff., esp. the quotations from the Syrian Fathers Aphraates (d. 367) and Ephraem (d. after 370), and from Pope Leo I, *ep.* 168 (459 A.D.).

"AID TO EDUCATION" IN THE LATE ROMAN EMPIRE

THE imperial constitutions of the fourth, fifth, and sixth centuries give us an interesting glimpse of the methods used by the Roman government to aid education in that period. Since there was not much money in circulation the government had to devise a plan other than a simple outlay of cash to promote learning in the Empire. It chose, therefore, to aid the teachers rather than to embark upon a building program.

In 364 Emperors Valentinian and Valens urged any one who was suited, by the quality of his life and by his abilities, for the instruction of the young either to open a new school or to reopen one which had been closed.[1] As far as government was concerned, by thus encouraging the one who taught to assume the burden of opening or reopening a school it escaped the cost of constructing a school building. On the other hand, this general permission to open a school loosed the potentialities of those who felt an urge to use in training the children of others the knowledge they had themselves acquired. Another stimulus toward providing educational facilities was afforded by the rich rewards which were to be reaped if they later received approval as public teachers.

Those who attained the position of public teachers were paid [2] and paid well. While private schoolmasters might complain of poverty, since their income was derived from contracts with the parents who sent their children to these private schools, public professors, paid by the State or the municipality, lived magnificently.[3]

[1] C. Th. 13.3.6.—The present paper is intended as a brief account of the pertinent imperial legislation; the author has not attempted to cover the extensive, specialized modern literature dealing with late Roman administrative law, nor to discuss the many erudite controversies attaching to it.

[2] C. Th. 13.3.1.2; C. 10.53.6.1.

[3] Buckler, "Byzantine Education," in *Byzantium* (Oxford, 1948), p. 209.

For example, Valens, Gratian and Valentinian wanted chosen, in all the larger metropolises of Gaul, the best teachers who could be found. They provided, too, in 376, that teachers of rhetoric should receive from the public treasury twenty-four *annonae*. In other words, it took twenty-four taxpayers, paying in kind, to support one teacher of rhetoric. Teachers of Latin or Greek grammar were to receive twelve *annonae*. A rhetorician in Trier, then the capital, was to get thirty *annonae,* while a Latin grammarian was to have twenty, and a Greek grammarian twelve.[4]

Further to aid the teachers the emperors allowed them certain very important exemptions from taxation, even as exemptions are allowed today for dependents. Their salaries were, in effect, increased by being relieved of the drain imposed by certain functions and offices (*munera*) which citizens in general were required to perform or fill at their own expense.

In the time of Constantine, by a constitution of 321 or 324, grammarians and other professors of letters were granted personal and property exemptions.[5] The same privileges were reaffirmed by Constantine in 333 when he decreed that the teachers' wives and children, too, were to be exempt from having to perform any functions and public offices. They were likewise exempt from receiving state guests[6] that they might the more readily instruct many in liberal studies.

Valentinian and Valens reaffirmed this exemption for the teachers of Rome and their wives, reminding the people that these teachers did not have to perform public services and were not, therefore, to be disturbed. They repeated, too, that teachers were not to have soldiers quartered on them.[7]

The same exemption was again confirmed by the Emperors Honorius and Theodosius. Grammarians, orators (rhetori-

[4] C. Th. 13.3.11.

[5] C. Th. 13.3.1.

[6] C. Th. 13.3.3; C. 10.53.6.

[7] C. Th. 13.3.10; Cf. U.S. Const., Amend. III.

cians), and teachers of philosophy were also exempted from municipal duties and service in the *curia*. They were even exempt from payment of the senatorial or glebal tax. They were to be freed from every function and all public duties, and their houses, wherever they stood, were not required to give hospitality to a soldier or a judge on circuit. These privileges were likewise extended to their children.[8] Included in this grant of exemption were professors of the liberal arts, and doctors as well, who had retired with the rank of count (*comes*) of the first or second class.[9]

Theodosius and Valentinian, in 427, also confirmed the exemptions granted by their predecessors. The teachers, as well as doctors and artists, were freed for life from the duty of offering hospitality, that they might devote their time to the arts considered necessary and to the liberal disciplines.[10]

This exemption from the duty of offering hospitality was no slight concession, for in houses marked by the government agents travelers were entitled to occupy one third of the house. These travelers were not, of course, to delay too long, nor were they to ask for forage for their animals or for a bath, but it was still an expense for the householder to provide a place where they might spend the night.[11]

Other exemptions, too, made the lot of the teacher in the Roman empire better than that of the ordinary citizen. Thus, teachers were not to be disturbed by being brought into court.[12] As a general rule, of course, a man's home was his castle [13] from which he was not to be dragged, the other party having a sufficient protection in being able to have the one who refused to appear defaulted.[14] This exemption, there-

[8] C. Th. 13.3.16; C. 10.53.11.

[9] C. Th. 13.3.17.

[10] C. Th. 13.3.18; C. 12.40.8; D. 50.5.10.2.

[11] C. 12.40.8.

[12] C. Th. 13.3.1.

[13] D. 2.4.18.

[14] D. 2.4.19.

fore, could also apply to the right to give bail or a recognizance in a criminal case, and thus avoid detention, as was allowed in the case of ladies, unless the charge was of the most serious kind.[15]

Teachers and their children were likewise exempted from military service by Constantine [16] and by Valens and Valentinian.[17]

Further protection was accorded to the teachers in that it was made a crime, punishable by a severe fine, to injure them in any way. If any one troubled them he was to be fined 100,000 *nummi*.[18] If a slave injured or insulted them, possibly because of jealousy, he was to be whipped by his master in the presence of the one he had injured. If the master had consented to what he had done, the master had to pay a fine of 20,000 *nummi*, and the slave was taken as a pledge until the sum was paid.[19]

Still a further advantage for the teachers in this period was the fact that after twenty years of satisfactory service in the capital cities they could look forward to being given the rank of *comes* on their retirement.[20]

Theodosius and Valentinian granted this title to the Greek grammarians Helladius and Syrian, to the Latin grammarian Theophile, the sophists Martin and Maxim, and the jurist Leontius. These men were given the position of counts of the first class, ranking with the " vicars." The emperors further provided that any others who attained such a degree of competence in the field in which they were professors should also be given such rank if after twenty years of sedulous labor in teaching they were considered worthy of it by the senators.[21] (The " vicars " mentioned above were the lieutenants

[15] Nov. 134.9.1.

[16] C. Th. 13.3.3.

[17] C. Th. 13.3.10.

[18] C. Th. 13.3.1.

[19] C. Th. 13.3.1.1.

[20] C. 12.19.3.

[21] C. Th. 6.21.1; C. 12.15.1; *Glossa* in C. 12.15.1 ad *v. amplissimo.*

of the highest administrative officials, the praetorian prefects, in the "dioceses," i.e., the major territorial units into which the four great prefectures of the Empire—Gaul, Italy, Illyricum, Orient—were divided.[22])

There may have been but nine of these professors at first.[23] At any rate they were originally of a closed number.[24]

The qualities which were sought in a teacher in this period are mentioned by several emperors. Julian, in 362, stated that teachers must be outstanding first in morality of life, then in teaching ability.[25]

Commenting on this requirement that teachers must excel in morality, the medieval Glossator, at the time the Roman rules were being adopted in Western Europe, remarked that morality was superior to all riches, but that the teacher must also possess knowledge, industry and faith, arguing from the introduction to the Institutes and C. 11.19.1.[26]

For promotion to membership in the nobility, on retirement, the qualities sought in the professor were: a good life, proven skill in teaching, in other words, the right feeling for the intent of the Law, as the preamble to the Institutes indicated,[27] facility in lecturing, subtility in interpreting, abundance in giving explanations.[28]

The number of public teachers who enjoyed the salary and the exemptions accorded to members of the profession was limited by imperial decree. Thus, Theodosius and Valentinian provided that at Rome there should be three orators[29] teaching rhetoric, the power of artistic persuasive speech,

[22] C. Th. 6.26.4; C. 12.19.1. Cf. C. 12.13.1.

[23] D. 27.1.6.1-2; D. 27.1.6.7.

[24] D. 29.1.42; C. 10.53.2.

[25] C. Th. 13.3.5; C. 10.53.7; cf. *Glossa* in C. 12.15.1 ad v. *vitam*.

[26] *Glossa* in C. 10.53.7 ad v. *moribus*.

[27] *Glossa* in C. 12.15.1 ad v. *peritiam*.

[28] C. Th. 6.21.1; C. 12.15.1.

[29] C. Th. 14.9.3; C. 11.19.1.2.

which Synesius considered indispensable for serving one's city.[30] There were to be ten Latin and ten Greek grammarians,[31] teaching a sort of middle school of classical studies.[32] The emperors also provided for five sophists,[33] teachers of dialectics.[34] They also decreed that there should be one philosopher, and two teachers of law.[35] This number was to be the same at Constantinople, too, since C. 11.19 is titled "*de studiis liberalibus urbis Romae et Constantinopolitanae.*"

The limitation for the two capitals, the old and the new, was also decreed for the other cities of the Empire. Thus, the provincial capitals, the metropolises, could have five rhetoricians and five grammarians. The other major cities, in which the imperial judges held court, could have four sophists, and four who taught Greek or Latin letters. The rest of the cities could have three sophists, and three grammarians.[36]

In this connection, Stein, considering Collinet's observation [37] that the number of professors at Constantinople and Beyrouth is obscure, points out that C. Th. 14.9.3.1 and C. 11.19.1.4 provide for but two chairs of Law [38] in two of the three authorized schools of Law in the Empire, Beyrouth being the third.[39]

Those who were chosen as public professors took the last place on the list of such professors.[40] In due course, however, as the older men retired, they advanced in grade until they

[30] cf. Buckler, *art. cit.*, pp. 204, 205.

[31] C. Th. 14.9.3; C. 11.19.1.2.

[32] cf. Buckler, *art. cit.*, pp. 204, 207-208.

[33] C. Th. 14.9.3; C. 11.19.1.2.

[34] *Glossa* in C. 12.15.1 ad v. *sophistas.*

[35] C. Th. 14.9.3; C. 11.19.1.4.

[36] D. 27.1.6.2; C. 12.15.1; compare Nov. 6.5.

[37] Collinet, *Histoire de l'École de Droit de Beyrouth* (Paris, 1925), pp. 193-196.

[38] E. Stein, *Histoire du Bas-Empire*, II (Paris and Bruxelles, 1949), 411, n. 1.

[39] Stein, *op. cit.*, pp. 410-412.

[40] Cf. C. 12.19.7.

became seniors themselves, as was the case generally for the members of the local officialdom.[41]

The choice of those who were to be given the position of public teachers rested with the local officials. Emperor Julian authorized the local officials to decide as to the teacher's morals and abilities, since he could not be present in person in all the cities. He stated explicitly that those who wanted to teach should not come forward suddenly or rashly to take this position but should be approved by the officials of the community [42] with, in addition, the consent of the principal persons in the place.[43]

This was the same sort of procedure as was used in deciding which lawyers should be permitted to practice.[44] On this basis the medieval Glossator argued that at least seven persons should agree that the person deserved the position.[45]

On the other hand, if the teacher did not prove successful or, as the imperial constitution of Gordian said, "useful," the decree of the local officials giving him tenure as a public teacher could be revoked and he could be dropped from the list.[46] The revocation of approval of the teacher could, however, be made only for cause, since, as Hadrian had said, what had once been decreed by the local officials was not to be rescinded except for cause, i.e. if the rescission of the prior decree would procure what was useful for the public.[47]

The elementary teachers, however, did not fare so well as those in the higher echelons. Those who taught boys their first letters did not have immunity from civil duties. That they should not, however, be burdened beyond their capacities, whether they taught in the cities or in small towns, was

[41] C. 10.32.56; compare *Glossa* in C. 10.53.11 ad v. *primi ordinis*.

[42] D. 50.9.1.

[43] C. Th. 13.3.5; C. 10.53.7.

[44] C. 2.7.11.

[45] *Glossa* in C. 10.53.7 ad v. *conspirante*.

[46] C. 10.53.2.

[47] D. 50.9.5.

left to the mercy of the presiding officers in the provinces.[48] In fact, immunity could not be given to anyone by the decree of the local officials unless they were leaders in liberal studies or doctors.[49]

Thus, those who taught "orthography"—the art of reading and writing correctly the old classical spelling which was going out of use in daily conversation—to the children of six or eight in the local elementary school,[50] after their first religious instruction at home, were not on the public payroll nor were they given the exemptions of those who taught in the higher schools of the Roman system.

Teachers who trained the children in the use of the abacus [51] were likewise not given exemptions. These were reserved to the teachers of liberal studies and were not given to those engaged in the arts generally, unless they came within the statutory exceptions.[52]

Philosophers seem to have fared but little better than elementary teachers. Only one was appointed in the imperial cities [53] and none were mentioned in regard to the other cities,[54] but they were, apparently, few in number anyway [55] and of the wealthier class.

Those who did not succeed in obtaining approbation as teachers of philosophy were to be sent back home. Valentinian and Valens, in fact, decreed, in 369, that anyone who had improperly and insolently assumed the garb of a philosopher was to be sent back home. Those who had been approved, however, might remain where they were.[56]

[48] D. 50.5.2.8.

[49] C. 10.47.1.

[50] Buckler, *art. cit.*, p. 204.

[51] C. 10.53.6; D. 50.5.2.8; *Glossa* in C. 10.53.4 ad v. *calculatores*.

[52] C. 10.67.1 sq.

[53] C. 11.19.1.4.

[54] D. 27.1.6.2.

[55] D. 27.1.6.7.

[56] C. Th. 13.3.7; C. 10.53.8.

The reason for sending these men back to their homes was that like other citizens they were supposed to perform certain functions, from which other teachers were excused, in their home cities, and at their own expense, thus, in effect, paying certain taxes there. When, indeed, one of these philosophers wrote to the Emperor seeking to be relieved of those burdens, as other teachers were, the Emperor answered that his profession and his desires were in conflict, for though he proposed to be a philosopher he was conquered by the blindness of avarice and was trying in vain to avoid the burdens imposed upon his patrimony, which he should realize was useless, if he considered the example of others.[57]

The burdens on his patrimony, referred to here, were those functions which had to be carried out as a charge on one's property [58] like assessments for highway improvement, and at the expense of the administrator.[59] These burdens were, in general, of two kinds. Some of them were laid upon one's possessions (patrimony) like the furnishing of horses and mules.[60] Certain other burdens even those who did not live in the town were bound to bear.[61]

Philosophers were, indeed, exempt from the base corporal services, such as labor to repair the dikes of the Nile, but they were not exempted from the burdens which could be taken care of by payment of taxes or the furnishing of other things out of their possessions. Again, somewhat ironically, the Emperors remarked that true philosophers despised money.[62]

This attitude toward the philosophers may have been due to some extent to the fact that the Government hoped to obtain from among the students and teachers in the official schools recruits for the government service, for the Church,

[57] C. 10.42.6.

[58] D. 50.5.11.

[59] D. 50.4.18.18.

[60] D. 50.4.18.21.

[61] D. 50.4.18.22.

[62] D. 50.5.8.4.

and for the courts of Law,[63] i.e., practically, rather than speculatively, trained men.

One might ask how the few teachers permitted to hold the public positions in the capitals, in the metropolises, the medium-size cities and the small ones could possibly take care of the general need and demand for education. It must not, however, be forgotten that alongside these public teachers there were other private masters who taught a considerable number of students.

While these private teachers were forbidden to usurp the title of " teacher " in public and were to be branded with infamy if they did so and driven from Rome; still, they were permitted to teach in private. Those, on the other hand, who held the position of public teacher were not permitted to teach private students.[64]

It happened not infrequently, too, that those who had proved themselves successful as private teachers were later chosen by the local officials for the post of public teacher.[65]

Since teachers seem to have received no special training in this period, and even the great masters seem to have started teaching as soon as their own student course was finished, the experience as a private teacher could well serve as the necessary preparation for the position of public teacher.

In laying down their rules for teachers and schools in the Empire the Emperors likewise did not overlook the students. Those who wished to go to Rome to attend school were first required to obtain permission from the local magistrates in the town where they lived. They were to bring with them a certificate giving their home address and their parentage, and indicating their abilities.

As soon as they arrived in Rome they were to state what course of studies they intended to pursue. They were to register with the public officials and indicate where they intended to stay in the city.

[63] cf. Buckler, *art. cit.*, p. 217; cf. also C. Th. 14.9.1.

[64] C. Th. 14.9.3; C. 11.19.1; Buckler, *art. cit.*, p. 211.

[65] Buckler, *art. cit.*, p. 212.

The public officials, in turn, were charged with the duty of seeing to it that the students behaved as they should, that they did not come into ill repute and that they avoided associations which were even close to being criminal. They were not to go to shows too often nor to spend too much time at late banquets. If they did not behave as they should in the city, in keeping with the dignity of the liberal studies they were pursuing, they were to be publicly whipped and immediately put on a boat and shipped back home.

Those who worked industriously with their professors were permitted to remain in Rome until they attained their twentieth year of age. After that, however, if they did not go home of their own free will the police were to see to it that they went home. Furthermore, the officials were to make a check each month to see who were in the city, whence they had come, and whether, their time being up, they were to be sent back to Africa or the other provinces. If their time was up they were to be seized and sent home, unless they were connected with some society. A yearly report was to be sent to the Emperor, that he might learn the capacities of each one and what training he had received and so decide whether these men might sometime be necessary for his service.[66]

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[66] C. Th. 14.9.1; Cf. Buckler, *art. cit.*, p. 209.

CORPORATE NATIONALITY IN INTERNATIONAL LAW

AN analysis of the modern corporation presents us with three major problems: (1) the management-shareholder relationship; (2) the problem of corporate concentration; and (3) the problem of corporate nationality.

It is with the last question that this paper will be concerned. Even if not expressly referring to corporations, our problem was at least partly raised by Marshall, C. J., at the beginning of the nineteenth century, in the case of *Thirty Hogsheads of Sugar v. Boyle.*[1] In the opinion of the Court, Marshall referred approvingly to a dictum by Sir William Scott in *The Vrow Anna Catherina.* Sir William had held that

> " it cannot be doubted that there are transactions so radically and fundamentally national as to impress the national character, independent of peace and war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in times of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of a nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation." [2]

In these words Sir William Scott and Chief Justice Marshall raised some of the basic questions underlying the modern problem of corporate nationality.

Our problem cannot be analyzed before the main trend of legal thought dealing with the nature of the commercial corporation has been briefly reviewed. As is well known, Austin

[1] *Thirty Hogsheads of Sugar* (Bentzon, Claimant) *v. Boyle,* 9 Cranch 191 (1815).

[2] *The Vrow Anna Catherina* (1804), 5 C. Rob. 168.

maintained that the corporation is a mere fiction, that it exists only for the brevity of discourse. Corporations were, he said, "persons by figment and . . . . all rights reside in the natural persons." [3] American courts held similarly that "a corporation is an artificial being, existing only in the contemplation of the law." [4]

At the beginning of our century Dicey and Jethro Brown challenged the Austinian concept of the corporation. Dicey held that

> "it is a fact which has received far too little notice from English lawyers that, whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted." [5]

Jethro Brown, following Dicey, stated that

> "if the law recognizes a distinction between a corporation and the sum of its members, it is not a mere flight of fancy, but for the very practical purpose of establishing the inherence of certain rights and duties which cannot conventionally be treated as inhering in the members of the corporation. . . . We have to look behind legal rules to the nature of things and to consider whether the law is merely employing a useful device for shorthand purposes, or is building on certain real analogies to natural personality existing wholly apart from legal recognition." [6]

These different approaches to the question of corporate personality forshadowed a struggle regarding the question of corporate nationality.

The problem of corporate nationality can be approached from the viewpoint of either municipal or from that of inter-

[3] Austin, *Lectures on Jurisprudence*, 5th ed. (1885), p. 354.

[4] *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); also *Bank of Augusta v. Earle*, 13 Pet. 519 (1839); also *Paul v. Virginia*, 8 Wall. 168 (1868).

[5] Dicey, *Law and Opinion in England*, as quoted by J. Brown, "The Personality of the Corporation and the State," 21 *L.Q.R.* (1905), 365.

[6] J. Brown, *op. cit.*, p. 367.

national law. The municipal approach deals primarily with the limits to which the individual country will go in developing statutory and administrative rules connecting the corporation with its own national economy. The international approach, on the other hand, will primarily consider the question whether there exist any internationally agreed-upon rules governing the determination of the country and of the national economy with which the corporation is *actually* connected. Before the First World War most authorities had agreed that corporations were incapable of holding nationality. De Vareilles-Sommières summed up the ideas prevalent at that time by saying that "the moral personality being a resumé and a representative of the members . . . . has no nationality . . . . only the members have nationality." [7] In 1918 it was stated that "there are no internationally accepted rules in existence with respect to the nationality or domicile of corporate bodies. Both concepts can be applied to corporations in a metaphorical sense only." [8] E. J. Schuster pointed out that "strictly speaking, the conception of nationality and domicile, in their ordinary meaning, are not applicable to corporate bodies. Nationality imposes duties which can only be performed by human beings, and confers rights which only human beings can enjoy." [9]

However, already in 1912 the pioneers of other ideas had entered the discussion on the problem of corporate nationality. E. Hilton Young maintained in his *Foreign Companies and Other Corporations* that the idea of nationality was a political rather than a legal one; and he considered it as doubtful whether a corporation was capable of possessing nationality in a political sense. If, however—Young said—corporate nationality in the political sense should exist, its substance would mainly consist of the corporation's right to claim the

[7] G. de Vareilles-Sommières, *Les personnes morales* (Paris, 1900), p. 645.

[8] "Is an American Corporation substantially owned by German Stockholders an Alien Enemy?" (Unsigned note), 27 *Yale L.J.* (1917-1918), 108, 109.

[9] E. J. Schuster, "The Nationality and Domicile of Trading Corporations," 2 *Transactions of the Grotius Society* (1916), 59.

diplomatic protection of a certain country. And he continued by saying that the corporate nationality in the legal sense of the word referred only to the personal law of a corporation.[10]

It was G. C. Henderson who directed attention to the important differences existing between the legal and the functional aspects of corporations. He held that a corporation might formally be connected with a particular country as far as the legal (civil) aspects of the corporation were concerned, i.e., its *activité juridique.* However, as far as its functional aspects, its *activité sociale* were concerned, any attempt to establish purely formal connections with a country was, according to Henderson, bound to become a mere chimera.[11]

The personal law of a corporation (its nationality in the municipal-legal sense) refers, therefore, to the *activité juridique* of the corporation, i.e. to the law under which the corporation was organized and under which it is carrying on its legal life; the personal law also refers to the provisions which govern the final liquidation and dissolution of a corporation. The *activité sociale,* on the other hand, consists of the sum total of the functional corporate activities which, in the case of commercial corporations, are exclusively situated in the economic sphere. And it is these functional activities which determine corporate nationality in what Young called "the political sense."

The personal law of a corporation poses problems with which municipal and private international law have to deal; public international law has hardly any influence on these questions. On the other hand, the key to the solution of the question of corporate nationality in public international law is to be found in the corporation's *activité sociale,* in the functional rather than the legal aspects of corporate life. The international-legal problem of corporate nationality has presented itself most frequently in connection with requests for

[10] E. Hilton Young, *Foreign Companies and Other Corporations* (1912), p. 111.

[11] G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918), p. 42.

diplomatic protection sought for corporations incorporated in foreign countries.

Western foreign offices have hardly ever hesitated to interpose, upon request, irrespective of the municipal nationality of corporations, when they deemed such interposition necessary in order to insure operative effectiveness for the existing rules of international law.

The British Government, in a note of April 21, 1938, addressed to the Mexican Government, elaborated on this point by stating as follows:

> "If the doctrine were admitted that a government can first make the operation of foreign interests in its territory dependent upon their incorporation under local law and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign governments could be prevented from exercising their undoubted rights under international law to protect the commercial interests of their nationals abroad." [12]

It has to be noted that the theoretical discussion regarding corporate nationality "has not served to convince statesmen that any technical rule should deter them from looking behind the corporate entity when the bona fide and substantial interests of their countrymen in foreign territory have required protection by governmental representation." And Hyde, dealing specifically with American practice continued:

> "At the present time the Department of State would probably not be reluctant to interpose on behalf of American shareholders . . . should the foreign state of incorporation irreparably injure their interests through illegal conduct, or should there be offered no reasonable means of obtaining redress through domestic channels. The decision as to interpose might, however, in the particular case depend upon the extent of American interests involved." [13]

[12] *British White Paper, Mexico,* No. 1 (1938), Document No. 3.

[13] C. C. Hyde, *International Law,* II (1947), 905, 906.

Hyde laid even more emphasis on this point when he stated that "American property calling for protection in foreign war-stricken areas embraces also property to which title is lodged in a foreign corporation (and even in an enemy corporation), of which the shares are owned by an American national or a corporation. . ." [14] The viewpoint of the Department of State regarding the conditions under which the Department would consider interposition as justified had already been laid down in 1912. In a letter of May 23, 1912, referring to the claims of the Quito Electric Light and Power Company against Ecuador, the Department stated first the fact that of the $450,000 shares issued only $100 were American-owned, and it continued:

> ". . . it would, therefore, seem that notwithstanding this enterprise is nominally American in character, there is an almost entire lack of any substantial American interest in the corporation, such substantial interests being principally English and Ecuadorian. For this reason the Department does not consider that it may, with propriety, make diplomatic representations on behalf of this company." [15]

This viewpoint maintained, therefore, that it is not the municipal nationality which entitles a corporation to diplomatic protection but rather the nationality of the interests economically predominant in the corporation. The corporate veil is lifted in such cases in order to determine the true "functional" nationality of the corporation under international law. "A theory concerning the nature of legal persons . . . must be flexible enough to permit the lifting of the curtain draping these entities, which will reveal the human beings who control and use them whenever this may be necessary to insure that legal rules become operative in their true sense." [16]

[14] C. C. Hyde, "Protection by the United States of American-owned Property in War-stricken Areas," 46 *Columbia L. R.* (1946), 522.

[15] MS. Department of State, file 422.11 Q 4/1, as quoted in G. H. Hackworth, *Digest of International Law*, V (1943), 845.

[16] M. Wolff, "On the Nature of Legal Persons," 54 *L.Q.R.* (1938), 521.

Corporate nationality in the domain of international law depends, therefore, on the nationality of those who own or control the predominant interests represented in the corporation.

The problem of corporate nationality under international law used to be of less importance in times of peace and used to assume increased importance in times of military, economic, or political warfare, and in the liquidation periods following such warfare. It was, therefore, during and after the First World War that the international law aspects of corporate nationality were first clearly developed. This development centered completely around the idea of the "control" exercised in and over a corporation, and the determination of the nature and function of that control. To examine the entire problem of corporate control various tests were developed.

What is the history of these control tests? Much confusion has existed with regard to the term "control" as it was used during and after the First World War. This confusion has to be traced back to the fact that the differences existing between the control test applied *durante bello* and the control test applied after a war for liquidation purposes have never been clearly analyzed. The term "control" does not necessarily refer to legal relations existing between physical persons and a corporation; or between a person or corporation, on the one hand, and property, rights or interests, on the other. "Control" refers here rather to functional relations, the realm of *activité sociale* and not to that of *activité juridique*. Corporate control deals, therefore, with economic facts irrespective of the legal forms employed to give expression to economic reality. "Control" is a power relationship, "it means the power to govern, dominate, direct or supervise in some respect the conduct of another. . ." [17]

The purpose of the control test developed during the First World War was to establish additional standards for determining the "enemy character" of a corporation. From the viewpoint of this control test a corporation was considered an

[17] 18 *Corpus Juris Secundum*, 28.

" enemy " *durante bello* if the majority stockholders or other influential organs of the corporation were domiciled in enemy territory, or if the majority stockholders or other organs of the corporation, wherever resident or domiciled, were subservient to the enemy.

The Trading with the Enemy Regulations of the various countries had and have the purpose of severing communications and economic contacts with the enemy, or of excluding the enemy from operating in the territory or possessions of the enacting country. Moreover, these regulations had and have the purpose of preventing economic infiltration by the enemy into friendly or neutral countries. The control test developed *durante bello* was meant, therefore, to pierce the corporate shell in order to enable the government to interfere with the enemy's communications, economic operations, and possible penetration attempts. Whenever the corporate will was influenced by persons of whom it was assumed that they were seeking to accomplish one of these purposes, the corporation was considered to be of " enemy character ". Most of the laws and regulations enacted during the Second World War assumed " enemy character " to exist *ipso facto* whenever the corporation was situated in enemy territory (or in enemy-occupied territory), or whenever the control over the corporation was exercised by persons domiciled in enemy territory (or in enemy-occupied territory).

The " father of the control test " to be applied *durante bello*, Lord Parker of Waddington, held in *Daimler v. Continental Tyre and Rubber Company, Ltd.* that

> " it would seem, therefore, logical to follow that in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the place of registration or incorporation must be looked at. My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance, and is very well understood in commerce and finance." [18]

[18] 2 *A.C.* (1916), 307, 339.

Unfortunately, this opinion was regarded later as also referring either to the nationality of corporations or to a control test to be applied after the end of hostilities. Neither assumption was correct. Lord Parker himself restricted his opinion to the determination of enemy character *durante bello* by stating that "the truth is that considerations which govern civil liability and the rights of property in times of peace do not govern enemy character in times of war." [19] And Oppenheim stated that "care ought to be taken not to confuse the test of enemy character of corporations as laid down in the Daimler case with the question of nationality of corporations." [20] The Daimler case was decided on an entirely different point. "The judgment did not impute enemy nationality but only enemy character brought about by its residence among the enemy." [21]

More recently, Viscount Simon in the *Soofracht V-O* case stated:

> "The test [of enemy character] is an objective test, turning on the relation of the enemy power to the territory where ... the company is commercially domiciled or controlled. It is not a question of nationality or patriotic sentiment." [22]

The purpose of the control test as developed for non-war periods is a different one. Hanna stated that "the enemy character of a corporation within the Trading with the Enemy Act may affect, but will not necessarily determine the nationality of a corporation as a post-war claimant." [23] The control test as applied for non-war purposes does not deal with assumptions like domicile or residence in enemy territory but it wants exclusively to ascertain "which interests are predomi-

[19] *Ibid.*, 344.

[20] L. F. Oppenheim, *International Law*, II, 6th ed. (1944), 222, n. 1.

[21] R. E. L. Vaughan Williams, "The Nationality of Corporations," 49 *L.Q.R.* (1933), 338, 339.

[22] As reported in the *Annual Digest*, 1941-1942, Case No. 156, p. 530.

[23] J. Hanna, "Nationality and War Claims," 45 *Columbia L.R.* (1945), 324.

nant in a corporation."[24] The use of the same term, control test, for ascertaining the enemy character *durante bello* as well as for ascertaining the predominance of economic interests for peace-time purposes has, as we said before, led to complete confusion.

By Article 297 (b) of the Treaty of Versailles, the Allied and Associated Powers reserved themselves the right to retain and liquidate within their territory all property of German nationals or of companies controlled by such nationals. The Treaty identified, therefore, for liquidation purposes, German-controlled companies with German nationals. The leading decision of the various Mixed Arbitral Tribunals set up under the Treaty of Versailles was handed down in the case of *Chemin de Fer Damas-Hamah v. Baghdad Railroad Corporation;* it came to the conclusion that it was not the intention of the peace treaties to deal with purely formal questions but with economic realities. The Franco-German Mixed Arbitral Tribunal deciding this case held that the solution of the question whether a company is German-controlled will depend on the relative importance of the interests represented in the company and not on technicalities which may possibly lead to confusion as regards the existence of these interests. Control, the Tribunal said, may be vested in the majority shareholders, or in a majority of the members of the Board of Directors, or it may be exercised by other indirect means.[25] In *Elmores Metall AG v. Gruenberg and Company*[26] the Franco-German Tribunal held again that the nationality of a corporation depended on the control exercised over it; the character of that control, in turn, was to be determined by the nationality of the majority of stockholders. In this case it was also held that a corporation could not be considered "German" if it had been treated as an enemy by Germany *durante bello*. The Tribunal maintained in both cases that the decisive factor

[24] *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, I, 401.

[25] *Ibid.*

[26] *Recueil*, V, 777.

regarding corporate nationality was the nationality of those exercising control, i.e., either the nationality of the majority of the shareholders or the nationality of the members of other organs of the corporation.

In *Steinkohlenbergwerk Friedrich Heinrich AG v. Deutsches Reich* it was held again that the nationality of the majority of shareholders determined the corporate nationality.[27] And the same Tribunal ruled in *Jordaan v. Germany* that corporations have no nationality proper, and that the majority of the physical persons associated in a corporation determine its nationality: ". . . undertakings incorporated under French law have, as juridical persons, no nationality proper, but the majority of the physical persons associated in the undertaking determine its national character." [28] The same result was reached by the Franco-Bulgarian Tribunal in *Regie Generale de Chemins de Fer et Travaux Publics v. Bulgarian State.* In this case the Tribunal recognized as French *ressortissant* a company established in accordance with Turkish law but controlled by French interests.[29]

In *Baron de Neuflize v. Germany and Deutsche Bank* the Franco-German Tribunal restated the doctrine that the nationality of the persons possessing the majority of shares " as well as other factors of a financial, administrative, and other character likely to secure for the subjects of one state the actual control over the affairs of the corporation will be decisive factors in establishing the nationality of a corporation." [30]

It was, however, the Permanent Court of International Justice, in its opinion in the case of the German-Polish Convention concerning Upper Silesia which offered the most thorough analysis of the control concept.

Article VI of the so-called Geneva Convention of May 15, 1922, dealing with Polish rights in Upper Silesia stated in part:

[27] *Recueil,* I, 422.

[28] *Recueil,* III, 889.

[29] *Recueil,* III, 954.

[30] *Recueil,* VIII, 158.

". . . except as provided in these clauses the property, rights and interests of German nationals or companies controlled by German nationals may not be liquidated in Upper Silesia." The purpose of this Convention was identical with that of Article 297 (b) of the Treaty of Versailles. The Permanent Court of International Justice in its Judgment of May 25, 1926, held that

> " the Geneva Convention does not, any more than the Treaty of Versailles, define the factors which constitute control, and the existence of which may involve the liquidation of a company's property. The Court is of the opinion that the conception of control in the Geneva Convention is essentially an economic one, and that it contemplates a preponderant influence over the general policy [of the corporation]." [31]

And then the Court started to analyze the concept of control and to offer its opinion as to what this concept actually amounted to in concrete terms. The Court was of opinion that any managerial organs may

> " according to the circumstances exert a decisive influence; nevertheless regard must be had in the first place to the shareholders, for under German law, as well as under other systems of legislation, it is the general meeting of shareholders which exercises the supreme power of the company. From the general meeting, which is the constituent body, directly emanate the powers of the Board and directly or indirectly those of the management. It is a well known fact that the acquisition of the majority of shares is precisely the means by which an interested person or group of persons may seek to obtain control over a concern. Though it is true that the Board of Control may be regarded as possessing control in the very common event of the shares being distributed amongst a very large number of persons, to a great extent unknown to each other, the position is entirely different if eighty percent of these shares are in the hands of four large shareholders, all members of the Board of Control, who can exert their influence by means

[31] Judgment (Merits) of the Permanent Court of International Justice, as reported in Hudson, *World Court Reports,* I (1934), 560.

> of their majority in the general meeting, and who, although in a minority, can in fact also do so in the Board of Control. In such circumstances it is not material if the company's statutes extend the powers of the Board of Control beyond those fixed by law. The Board remains, notwithstanding, responsible to the majority of shareholders." [32]

In the concept of control there exists, the Judgment held, only one rigid legal factor, namely, the nationality of the physical persons who exercise control. The nationality of these persons, the Court concluded, will, therefore, determine the character of the controlled corporation.

It is, therefore, the nationality of the owners or of other persons who control a corporation, which in the domain of international law constitutes the decisive factor in determining its nationality. Whether the nationality of the owners or that of other persons controlling the corporation will be the decisive factor depends, in turn, on the question whether stock ownership is concentrated or dispersed.

The only other test of corporate nationality which could possibly be applicable in international law is the so-called *siège social* test. However, this test is older than the control test and it hardly ever found the explicit backing of any international tribunal. Reference is made to this test only because it has been mentioned by some authorities on international law as a possible standard for deciding corporate nationality. By *siège social effectif* is to be understood the place where " the brain which controls the operations " of the corporation is situated.

> " The brain of the corporate body is situated in the place where those who direct its policy and its mode of action are accustomed to meet and to form their resolutions. Whether those present are designated by the name ' directors ' is immaterial. There may be nominal directors in one place, and so-called ' local directors ' in another place. If these local directors have merely to follow the orders given by the directors residing at the place of the head office, they do not constitute the brain of

[32] *Ibid.*, 561.

> the company.... The statutory head office may be nothing more than an address for service. The brains of the company may be found in quite a different place." [33]

If the statement that " there are no internationally accepted rules in existence with respect to the nationality or domicile of corporate bodies " [34] should be correct, what other standards could possibly be applied to the solution of our problem? The answer seems to have been given in the award handed down by the Tribunal established by the United States and Great Britain in the *Cayuga Indians* case:

> " The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of the corporation would lead to inequitable results or to results contrary to legal policy may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries." [35]

A resumé of this case and of the award in the *Annual Digest,* 1925-1926, refers to the fact that recourse to rules of equity thus conceived amounts actually to the application of " general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state." [36] And the resumé continues by saying that it is one of the elementary principles of justice " to look at the substance and not to stick in the bark of the legal form." This principle requires courts in the interests of justice to look behind the corporate entity—without necessarily destroying it—in order to discover the real substance, the functional relations of the corporation, its *activité sociale.*

We see that even if the firmly established rules of international law regarding controlled companies and corporate na-

[33] E. J. Schuster, *op. cit.*, n. 9, *supra*, p. 70.

[34] Note 8, *supra.*

[35] *Nielsen's Report* (1926) 314, as reported in Hackworth, *Digest of International Law*, I, 8, 9.

[36] *Annual Digest*, 1925-1926, Case No. 300, p. 399.

tionality were to be disregarded, the problem would still have to be solved along identical or similar lines; application of the principles of international equity would again lead to the concept of the corporate *activité sociale* and to the conclusions necessarily to be drawn from that concept. The United States-Canadian Commission deciding the *I'm Alone* case (the sinking of a rum-runner of Canadian registry on the high seas by a US revenue cutter) held in a joint interim report that the Commissioners

> " may inquire into the beneficial or ultimate ownership of the I'm Alone and of the shares of the corporation owning the ship, as well as into the management and control of the ship, and the venture in which it was engaged; and that this may be done as a basis for considering the recommendations which they shall make." [37]

In their joint final report of January 5, 1935, the Commissioners based their award refusing compensation to Canada for the loss of ship and cargo on the fact that " the ship was *de facto* owned, controlled, and at the critical times managed by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States " [38]—and this although the sinking of the vessel " could not be justified by any principle of international law."

Following the Second World War, the provisions of the Italian and Rumanian peace treaties, the Swiss-Allied and the Swiss-American Accords regarding liquidation of German assets, and the Brussels Agreement of December 1947 regarding conflicting claims to enemy assets, all applied the control test for determining corporate nationality and the nationality of assets. The outstanding fact in these international agreements has been that the application of the control test was not any more left to administrative or judicial discretion but that it had become legislative and treaty policy. All these agreements and accords provide that the nationality of a corpora-

[37] *Annual Digest*, 1933-1934, Case No. 86, p. 205.

[38] *Ibid.*, 206.

tion is to be determined by the nationality of those who own or control the corporation, other tests, if mentioned at all, being completely subsidiary.

That the control test has come to stay seems to have been finally established by the various commercial treaties concluded by the United States since 1946. We refer specifically to the treaties of Friendship, Commerce and Navigation concluded with China in 1946, with Italy in 1948, and with Uruguay in 1949.[39] Particularly the treaties with Uruguay and Italy are considered model treaties laying down the principles which will probably guide the United States Government in future negotiations. All these treaties provide that—as a general rule—companies organized and incorporated in the other country will be given national or most-favored-nation treatment. However, all these treaties also provide that each party reserves the right to deny rights and privileges stipulated in the instrument to corporations of the other country which are owned or controlled by nationals, corporations or associations of any third country or countries.

These provisions again seem to prove that the control theory has become internationally accepted legislative and treaty policy; the rights and privileges of a corporation are obviously from now on to be determined internationally by the national character of those who exercise control over it, i.e., by the nationality of those who actually decide to which national economy the benefits of the corporate activities will finally accrue.

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[39] Text of Treaty with China, *Department of State Press Release* 733 of November 4, 1946; text of Treaty with Italy, *Department of State Press Release* 77 of February 2, 1948; text of Treaty with Uruguay, *Department of State Press Release* 916 of November 23, 1949.

Notes and Reviews

Studies in Land and Credit in Ancient Athens, 500-200 B.C. The Horos-Inscriptions. By Moses I. Finley. Rutgers University Press, New Brunswick, N. J. [1952]. Pp. xii, 332. $3.50.

The author of the book under review is not a *homo novus* to the readers of this periodical. His remarkable article on "Some Problems of Greek Law," with its profound critique of F. Pringsheim's *Greek Law of Sale,* was published in these pages last year and did not fail to attract the attention of the experts in the field. With his new book, Dr. Finley has definitely established his place among the very best writers in the domain of Greek law and its sources. Being thoroughly familiar with the inscriptions, orations, and other literary works of ancient Greece, and perfectly acquainted with the pertinent modern literature in a field which at present is represented by a rather limited number of specialists, this extremely conscientious scholar gives every promise to further our knowledge of an important sector of classical antiquity.

The opening pages of the book are devoted to an analysis of the legal significance of one type of ὅροι, i.e., the stones which were put on the boundaries of a landed estate in order not only to mark them, but also, and in the first place, to give public notice of the legal condition of the property and to provide information about its encumbrances for people who wished to enter into a transaction concerning this property. The *horos*-inscriptions were also applied to houses: the text in this case was scratched on a wall. The *horoi* published so far number about 220. They represent in an overwhelming majority an Athenian custom, unknown in most other cities of the Greek world. Since many of the *horoi* are badly preserved and, moreover, very laconic in content—the owner of the property, e.g., is never named—they constitute a source material which is somewhat slender and far from giving a full picture. Only with the help of occasional mentions by orators and lexicographers can an attempt be made at reconstructing the juristic, economic, and social aspects of land-credit relationships from *horos*-inscriptions: not an easy task indeed, since many of them offer not even a clue for dating the pertinent transaction; and if, perchance, we have

a well-preserved *horos* with a longer text, it raises more problems than it solves.

The scholarly accuracy in interpreting and exploiting the sources from various viewpoints constitutes the fundamental value of Finley's extensive study. There is not one variant in the inscriptions (and the variants are many, since rigid formulae were not prescribed for the *horoi*) which is not taken into consideration; even the smallest detail is not neglected but always brought in accord or at least confronted with more reliable texts. Nor does the author conceal his doubts where his solutions are not fully certain or where the texts raise insoluble problems.

The terms for "security" which appear in the *horoi* are ὑποθήκη, πρᾶσις ἐπὶ λύσει, and ἀποτίμημα, the last of these being referred to two different legal transactions, according to whether the security was to guarantee (*a*) the restitution of a dowry by the husband when the marriage was dissolved, or (*b*) the return of an orphan's property leased by his guardian for the duration of his minority. This brief statement already gives an indication of the variety of legal institutions that could become involved with security given in real property. The author makes an invaluable contribution to the understanding of the nature and "external aspects" of all those types of security transactions (pp. 29-54). He reserves, however, for future presentation a systematic analysis of creditors' rights, foreclosures, and related problems; a circumstance which, for the time being, leaves open several questions of interest primarily to the legal historian. A minute discussion is devoted to πρᾶσις ἐπὶ λύσει from both the philological and the legal viewpoint, and to the two forms of ἀποτίμημα (virtually known only in Attic texts). The author succeeds in eliminating various mistakes which are traditionally repeated in modern literature. According to his interpretation, πρᾶσις ἐπὶ λύσει was in its essence a form of hypothecation and not a true sale on condition of release, since, as a rule, the debtor retained his encumbered property. Nor was the transaction a sale in its economic aspects. Why then the term *prasis*? Finley sees in it a hybrid category, "a security in the form of a conditional sale" (p. 35). The suggestion seems attractive to me: the transaction was turned into a definite sale eventually, if the debtor failed to pay the debt at the fixed date or to fulfill the terms of the original agreement.

Various problems are involved with the ἀποτίμημα in both its applications. With regard to the orphan's property, it is called by the author pupillary ἀποτίμημα and was connected with lease of the estate (house, household; μίσθωσις οἴκου), wholly or in part, by the guardian to a third party, whose property after evaluation (ἀποτίμημα) was set up as security for the fulfillment of his duties as a lessee.

Statistics show (p. 30) that *horoi* with ὑποθήκη refer to lower debts (with a median at 525 drachmae), while πρᾶσις ἐπὶ λύσει was applied rather to higher debts (a median of 1050 dr.); ἀποτίμημα connected with the constitution of a dowry (dotal ἀποτίμημα) shows a median of 1900 dr. If these figures are not merely accidental and will be confirmed by future discoveries, the phenomenon is characteristic, but not easy to explain. Were not perhaps the creditor's rights better protected (procedurally?) in the last two forms of security?

Further sections of the book deal with the economic, political, and social aspects of the various kinds of wealth, land, and houses (rural and urban holdings), money and slaves, as far as the *horoi* contain some hints in this respect, although the description they give of the hypothecated property is very limited. Special chapters are concerned with the legal capacity of persons and groups (bodies of public or religious character, private associations and organizations) involved in transactions in which security was set up, always with a view to their respective economic and social standing. The pertinent analysis permits an approach to determining the strata of the population among which hypothecation of land and houses played an important role, as well as the types of security that occurred in the wealthiest group.

Among the *horoi* some instances are found of a plurality of creditors to whom security is given. On the one hand, a number of creditors was grouped in an ἔρανος, i.e., a union of individuals who supplied the funds for a (non-productive) loan without interest, to be repaid over a period of years in regular instalments and granted primarily in emergency cases (e.g., ransoming from captivity, tax payments). On the other hand, cases are known in which security is put up in favor of two or more creditors, either jointly (active correality) or distinctly; all these cases are classified by the author under the heading, "multiple creditors." Here again certain questions—despite a precise analysis (pp. 107-117)—must remain unsolved owing to the defectiveness of the sources.

The foregoing, rapid survey gives only an incomplete picture of the contents of the work. There is no section of Athenian law to which the author does not contribute some interesting remarks, be it family law, the law of succession, general principles of the law of obligations, written or oral agreements, etc., not to forget his illuminating discussion of individual cases dealt with in orations by Lysias, Demosthenes, Isaeus, and others.

The author leaves the papyrological material aside (see p. viii) lest any conclusions from the papyri of the Ptolemaic period be applied to legal institutions of ancient Greece. The caution is justified, although comparative observations might certainly have been instructive. For terminological remarks the early Greek papyri would have been of use, as, f.i., for μίσθωσις (which can hardly mean rental, as the author assumes for Harpocration; see p. 234 n. 4), μίσθωμα (see *horoi* nos. 130, 131, and Schulthess in Pauly-Wissowa 15.2097, 2125f.), οἴκημα (pp. 59, 214 n. 55), ἐργαστήριον, and the like.

It was a happy idea to collect in four statistical tables (pp. 172-176) information about the nature of property set up as security, the amount of the obligation guaranteed, the number of creditors, etc., for all types of security met in the *horoi*. The texts of the *horoi* themselves are published in Appendix I (pp. 118-171) and completed in App. III by texts which appeared while the book was in press (pp. 182-190, see below).

It is not a gratifying *signum temporis* that what authors so far have been accustomed to put in footnotes is nowadays, because of the high costs of printing, often transferred to the end of a book; a usage becoming, alas, more and more widespread. The discomfort which this system creates for even the most conscientious reader cannot be denied. But apparently it becomes unavoidable, and readers must adapt themselves to this inconvenience. In the case of the book under discussion, it is the reviewer's duty, however, to call particular attention to that part, which occupies nearly one third of the work (pp. 195-300). The notes are indispensable for the understanding of the author's method and ideas. Not only references to the sources and extensive quotations of texts, terminological and etymological remarks, bibliographical references and other materials generally found in footnotes are packed in those pages. But, what is more important, they document the author's critical attitude towards nearly all the books and articles cited.

Here is more than a mere enumeration (itself amazing in quantity) of titles: each important publication is critically (sometimes too severely) evaluated, occasional errors and misinterpretations are marked as such and corrected. In most cases his criticism appears convincing, especially where he shows that the assertions he rejects find no support at all in the sources adduced by the authors. It is a kind of general "purge" of the pertinent literature. At times, Finley's critique goes perhaps too far when it is based exclusively on the lack (as distinct from misinterpretation) of evidence in the sources. After all, the contingent nature of the extant *horoi* and their defectiveness make it impossible for them to offer an answer to all problems. No doubt it is gratifying to have the sources soberly evaluated in a correct way, but, on the other hand, where the sources are silent, hypotheses based on reasonable arguments, practical considerations, and comparison with other legal systems, are permissible and even desirable—provided that they are presented as hypothetical. For the rest, future discoveries may prove their correctness or incorrectness.

As to the author's knowledge of the scholarly literature, his command of the enormous number of books and articles connected with Greek legal and economic life (over and above the special Bibliography, pp. 304-308) is imposing indeed. One has the impression that if all the references were collected, they would present an almost complete bibliography of Greek law. The accuracy of the citations is exemplary; sometimes there is even too much of a good thing. I, for one, do not realize what purpose is served by mentioning such details as, for instance, the number of volumes (together with their respective years of publication) of a two or three-volume work or of a *Festschrift* if only a few pages or even only one footnote of a specific volume or article are referred to. The same may be said of citations of both the first and the last page of articles in periodicals, encyclopedias, or collective works when only a particular page or note is recommended for reading. Although, according to an old Roman adage, *superflua non nocent,* such accumulation of numerals would seem an unnecessary ballast.

Needless to say, Finley's book is provided with all the useful indexes: one index of sources (literary works and inscriptions), one of Greek words, and a General Index, all bearing witness to the richness of the contents and the abundance of the source material utilized in the work.

Through a strange coincidence, while Finley's book was in press, the *horoi* were also published and commented upon in a comprehensive edition by John V. A. Fine, *Horoi Studies in Mortgage, Real Security, and Land Tenure in Ancient Athens* (Hesperia, Suppl. IX; American School of Classical Studies at Athens, 1951). Thus Finley had the opportunity of completing his collection with some forty *horoi* (see his Appendix III), some recently unearthed in the Athenian Agora, some published elsewhere in editions that had not been available to him. With one or two exceptions the group does not contain any new details of importance. I could, of course, not refrain from looking into Fine's book. To my great astonishment, I found in the Foreword (p. vi) some statements which may be repeated here verbatim: Professor Fine is fully aware that the subject matter of his book " belongs to a field of research more appropriate for a trained jurist than for a general student of Hellenic antiquity," and he suspects moreover, that his " lack of formal legal training may have caused him to make certain statements which in the eyes of legal experts will seem unprofessional and possibly even naive." But he consoles himself with the reflexion that " nevertheless, in studying Athenian private law the novice has one advantage which is denied to the professional. He can approach the subject free from all preconceived notions derived from other legal systems."

I am convinced that the legal professionals challenged by the last statement will willingly renounce " the advantage " Professor Fine concedes to " novices " lacking " formal legal training." For a legal historian to take a position on such assertions is superfluous, at least in this review. May it suffice to state with satisfaction that Dr. Finley does not need such a general *laissez-passer* for naivetés or misunderstandings. He for one is thoroughly prepared, not only to face legal problems as unavoidable and complex as they are in the field of the law of security, but also to examine and criticize opinions of other scholars, both legal " professionals " and " general students ". Moreover, his conversance with Anglo-American legal concepts enables him incidentally to compare ancient legal situations with modern law and to warn of an inappropriate application of English juristic terms to Greek institutions.

Finley's study is conceived as the first part of a comprehensive project embracing land-credit relationships in the whole of the ancient Greek world. What the author has offered in the volume

here reviewed deals only with Athens and is limited in time to three centuries, from the fifth to the third century B.C. It may be hoped that his future studies will bring, among other things, an important, if not decisive, contribution to the basic problem in the history of Greek law, to wit, how far the still predominant opinion of its "unity" is justified—provided that the source material for the remainder of Greece, which is by far more scanty than for Athens, will permit conclusive results.

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Classical Roman Law. By Fritz Schulz. Oxford, Clarendon Press, 1951. Pp. xii, 650. $8.50.

The appearance of a new work by Professor Fritz Schulz is an event which will be greeted with sincere gratitude and satisfaction by everyone interested in Roman law. A leading Romanist and an independent thinker among the legal historians of our time, the eminent scholar was recently honored by an imposing, two-volume *Festschrift* (Weimar, 1951) on the occasion of his seventieth birthday. For nearly two decades he has by now lived far from his native country, in England, where he continues his scientific activity with a youthful temper, a creative and critical (at times, perhaps, hypercritical) mind, and a masterly domination of the field to which he has devoted a long life on uninterrupted research.

The work under review, a septuagenarian's gift to young students and mature scholars, is a worthy counterpart to his *Prinzipien des römischen Rechts* (1934, English translation by Marguerite Wolff, 1938; Italian translation by V. Arangio-Ruiz, 1946) and his *History of Roman Legal Science* (1946)—a magnificent trifolium in the Romanistic literature of our century. The recent publication deals exclusively with Roman private law of the classical period (from Augustus to Diocletian). It is the first time that the word "classical" appears in the title of a textbook of Roman law. The unforgettable Ludgwig Mitteis started a treatise of the classical law in his *Römisches Privatrecht bis auf die Zeit Diocletians* (vol. I, 1908), but the work remained an "unfinished symphony," written with tones and chords different from those of Schulz's book.

The latter is divided into five parts: law of actions (pp. 11-70, particularly welcome since civil procedure as such is excluded), law of persons and the family (pp. 71-202, with a chapter on corporations), law of succession upon death (pp. 203-333), law of property (pp. 334-454, including real securities, *fiducia* and *pignus*, inserted between servitudes and *possessio*), and law of obligations (pp. 455-633).

Schulz's book differs in many respects from all other presentations of the Roman private law published in the last few years. Most of these deserve high praise; his, however, is the most original and the most courageous, too. What this reviewer enjoyed most when reading the book were those brief, occasional remarks scattered in passing throughout the whole work which will serve future writers as an inspiration to look at certain phenomena in the Roman legal system from a new angle and hence to engage in new research. Page after page offers new, stimulating, and ingenious ideas which, no matter whether they are right or wrong, testify to the originality of the author's thought.

The book has no footnotes; instead, references to fundamental source materials and a masterly, selective bibliography are given severally at the end of the subdivisions of each chapter. One has, however, the impression that the author did not attach too much importance to specific citation of individual sources. He says (p. 8): "... citations are rarely looked up by students"; but will his book really be used only by beginners or in the classroom? In my opinion, it will be a "must" for anyone writing on a topic of Roman private law to consider Schulz's theses.

His approach to citation of sources may also explain the regrettable absence of an index of sources. This should not have been missing; all the more so because an overwhelming majority of the texts cited are labeled as non-classical, by the use of brackets or by specific remarks, i. e., they are considered by Schulz to be either postclassical or still later in origin (Schulz uses here a new word, "pre-Justinianic"), or to have been inserted by Justinian's compilers. This qualification of decisive texts is a very important part of the author's presentation since it reveals why certain rules are included in, or excluded from, his textbook; a problem which in many points of detail will remain debatable even where he categorically insists that a given text is non-classical. Some such con-

troversial points have already been noted by writers of high authority in the field (see Riccobono, *Bullettino dell' Istituto di diritto romano* 55-56 [1952] 397 ff.; Arangio-Ruiz, *Studia et Documenta Historiae et Iuris,* 17 [1951] 349 ff.). Needless to say, this reviewer, whose position on the search for interpolations is somewhat different from that of Schulz, is not able to follow him (or his predecessors whose textual criticism he accepts) in some further interpolationistic assertions. This is not the place, however, for a detailed discussion.

A few remarks of a general character may be permitted. Schulz did not aim at completeness, and this for good reason, as he stresses in his instructive Introduction. He confined himself (p. 6) to " classical legal institutions and principles, sociological and political [!] aspects being predominant." He wishes that his book " be used as an introduction and as supplement to more comprehensive books." But is there not a danger that some omissions may be misunderstood to mean that, when the author passes over a topic in silence, he is excluding it from the classical law itself? Surely not even a beginner would think so when he misses a discussion of freedmanship (only four pages are devoted to slavery and manumission); but the absence, for example, of institutions that are important in relations among neighbors (*operis novi nuntiatio, cautio damni infecti*) or of *actio exercitoria* and *actio institoria* is striking. I cannot believe that the author reckons these topics among the " juristic subtleties " for which he refers the reader to other textbooks.

The book contains much more than mere classical law, and this is quite understandable. One cannot speak of classical law without saying that some legal institutions or rules which other writers consider to be classical were introduced in later ages. It is therefore not by accident that the term " postclassical " is among those most frequently used in the book. Also, wherever a text cited is marked by brackets as non-authentic in one way or another, the reader is implicitly advised as to what in the author's opinion is of non-classical origin. Similarly, frequent references to Justinian's law were unavoidable in Schulz's presentation of Roman classical law.

The term " postclassical," which in recent times has become so popular in Romanistic studies, should be defined more precisely. Does it refer only to the few decades which immediately followed

upon the classical period, from the time of Diocletian on, or does it also cover the whole of the fourth and fifth centuries? The term is used in the literature in both senses although the distinction of "early" and "late" postclassical is gaining ground. With Schulz, the term appears often in the wider sense (just as he uses the word *vorjustinianisch* even for the end of the third and the first half of the fourth century: see *Zeitschrift der Savigny-Stiftung, Rom. Abt.* 68 [1951], 7). An exact delimitation of the expression "post-classical" is all the more necessary in view of a recent tendency—in which Schulz has been the leader, with H. J. Wolff and F. Wieacker as his zealous followers—to assume the existence of a highly developed activity in making postclassical editions of classical juristic writings. One scholar, who recently wrote about the "Lives" (*Lebensläufe*) of classical juristic writings in postclassical times, speaks in figurative language of a *grosse Textbewegung* (I do not dare translate the phrase) until about 320 A.D. The new trend, to be sure, is actually in swing, but the position of many leading Romanists is still unknown. A general discussion will certainly be forthcoming in the next future. If many remain unconvinced, the reason lies in the confusing discrepancies among the ardent representatives of the new trend themselves. As to the personalities of those anonymous re-editors who are said to have produced the "standard" editions of the classical writings, one scholar qualifies them in one place as "official career men" (as distinct from practitioners or scholars), but another time he speaks of their work as *Gelehrtenarbeit*. Schulz himself (*Zeitschr. cit.*, p. 5) speaks of non-authorized private individuals who arbitrarily changed the texts.

What is more important, the extension and nature of the changes introduced in those innumerable new editions are presented by different scholars with a very different appreciation: on the one hand, they are said to be formal, harmless, explanatory insertions; on the other, they are considered as more or less drastic alterations, both linguistically and substantially, of classical texts. In his latest credo on interpolations (*Zeitschr. cit.*) Schulz insists that most of the interpolations ascribed by modern Romanists to Justinian and his collaborators were simply copies of what anonymous post-classical authors had inserted into classical writings. Nobody doubts the existence of second editions (*repetitae praelectiones*) of

classical juristic writings—after all, they are sporadically mentioned in the sources—nor is the doctrine of postclassical changes (glosses) anything new. But the general problem remains *sub iudice*: was there a production *en masse* of second and standard editions, and were there substantive alterations? This reviewer, for one, has remained as skeptical as he was a few years ago (when reviewing Schulz's *History of Roman Legal Science*: see *Classical Journal* 43 [1948], 440) towards the new tendencies, which a gifted young Italian scholar did not hesitate to call a fad (*moda postclassicistica*).

It is only natural that Schulz's position towards postclassical legal development and juristic literature leads him to making apodictic statements about important *lacunae* in modern Romanistic literature and about books which still ought to be written: in his opinion, we have no book "giving a true historical exposition of Justinian's law" (p. 5), no modern work on the Roman law of possession (p. 433), on the law of obligations (p. 463), on legacies (p. 315), and so forth. Some scholars may not subscribe to all of these statements, although everyone will certainly welcome exhaustive, "modern" presentations of the topics mentioned—provided they are free from preconceived ideas, that is, undertaken with a sound, reasonable, and not excessive criticism of the sources.

Professor Schulz's book is perfectly produced. Hunters for misprints will be disillusioned. Only the Index, probably not composed by the author himself, could have been easily improved. Quite a number of items are dealt with in the book but do not appear in the Index. Also, many page references in the latter require correction. We mention this only in view of translations of the work, which certainly will follow, and of a future edition, which, we heartily wish, may be prepared by the author himself.

In conclusion, the new opus of Schulz is a remarkable enrichment of the Romanistic literature in general, and of that written in English in particular. It ranks among the best comprehensive presentations of Roman private law. The exposition is clear and precise, the language simple and easy, free from empty or florid phraseology. As a whole: a fascinating and stimulating book, which crowns the rich and fruitful activity of its author.

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Römisches Recht. I. *Geschichte, Rechtsgang, System des Privatrechts* von Fritz Schwind. II. *Grundlehren des gemeinen Rechts; Romanistische Einführung in das geltende Privatrecht* von Hans Kreller. Wien, Springer Verlag, 1950. Pp. xx, 410 and xv, 414.

Among the numerous works on Roman law which are destined for university students, these two volumes, written by two Viennese professors, deserve honorable mention. They present Roman private law in its historical evolution.

Vol. I by Professor Schwind is divided in three parts: (1) "The external conditions of the evolution of Roman law," presenting the history of the institutions and legal sources of the Republic, the Principate, and the Dominate (pp. 6-90); (2) History of Roman civil procedure (pp. 91-137); (3): "The evolution of Roman private law" (pp. 138-396). This last part forms the center of gravity of the volume. In an attractive way, the reader is presented here with the most important problems of Roman private law, the usual system being on the whole preserved: Law of persons, including family law; law of property and *iura in re aliena*; law of obligations—in this connection the general theory of transactions (*Rechtsgeschäfte*) is dealt with—; and law of inheritance.

Volume II by Professor Kreller is designed for the advanced student. It starts with a brief account of the role of Justinian's compilation in the legal and economic history of the Occident, from the Glossators down to present times (pp. 1-72). Then follows the chief part of the book: Principles (*Grundlehren*) of the *Gemeines Recht* (pp. 74-404). Here the author combines Roman private law and the civil law of the present time, with special regard to the Austrian *Allgemeines Bürgerliches Gesetzbuch* and the German *Bürgerliches Gesetzbuch*. Of course, only part of the tremendous material collected in the famous *Pandekten* of Winscheid and Dernburg could be included, but the selection is skilful and well adapted to the special purpose of this book. The "supra-legal and supranational problems" are well chosen and delineated.

The book is written in the good Austrian tradition which considered the *Pandekten* the "high school of any jurisprudence," as Wenger once put it. This course was taught also in Leipzig by the great Austrian scholar, Ludwig Mitteis, whose lectures will re-

main unforgettable to all who attended them. Problems from the *Pandekten* frequently formed the basis of discussion in Roscoe Pound's seminar on Jurisprudence which he gave at Harvard until about ten years ago.

Written primarily for the use of Austrian as well as German students, the two volumes will be of value to students in other countries as well; they will be especially welcome for studies in comparative law.

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The Theodosian Code and Novels and the Sirmondian Constitutions. A translation with commentary, glossary, and bibliography by Clyde Pharr in collaboration with Theresa Sherrer Davidson and Mary Brown Pharr. Princeton University Press, 1952. Pp. xxvi and 643. $20.00.

Few works of equal repute have been less often studied and, in our time, have been less accessible to any but a small circle of experts than the Theodosian Code. Issued with a tremendous fanfare, the Code survived scarcely a century before it was relegated to the antiquarians by the codification of Justinian. Medieval jurists ignored it and, although the monumental work of Gothofredus revived interest among legal historians, knowledge of the Code is today confined to specialists in Roman law and the history of the later Empire.

The appearance of a complete English translation, the first in any language, is therefore an event of first-rate importance. Included in the volume are not only the Theodosian Code (together with the *Interpretatio*) and Novels and the so-called Sirmondian Constitutions, but also the Novels of five other fifth-century emperors, Valentinian III, Majorian, Marcian, Severus, and Anthemius.

The translation is excellent. Professor Pharr and his associates have properly and successfully worked "to make a closely literal translation that will be clear and readable," avoiding paraphrases and striving to recapture the "stilted effect" of the original, "a Byzantine style that was highly artificial and bombastic." They have been meticulous in noting corruptions in the manuscripts,

possible alternatives in reading and interpretation, and ambiguities in phraseology.

In the first instance, what the editors have accomplished is to make available to a wide, new circle of legal historians and others interested in the later Roman Empire, to students of comparative political, social, and economic institutions, to Church historians, to historians of the Jews, a rich, and in many respects inadequately tapped, collection of source materials. But it is not only the student who has little or no Latin who will be permanently indebted to Pharr and his colleagues. The language of the Code and Novels is so uninviting, so difficult in fact, that even the experienced Romanist approaches the work with hesitation. He, too, will find ample opportunity to be grateful for this new tool with which he has been provided.

Were Professor Pharr's mission at an end with this publication —a twenty-year effort requiring not merely the qualifications of good scholarship but also the tenacity and singleness of purpose to overcome serious financial obstacles—, this review could close with one more expression of thanks to the individuals and institutions who have made the translation available and with a word of appreciation for the excellence of the typography, in every respect a credit to the art of bookmaking. However, on the page facing the title-page, we read, "The Corpus of Roman Law (Corpus Iuris Romani), A Translation, with Commentary, of all the Source Material of Roman Law, Volume I." It seems proper, therefore, to offer some suggestions which may increase the usefulness of future volumes in the projected series.

The suggestions are directed to one characteristic of the translation and to the elaborate apparatus that accompanies it, consisting of thousands of footnotes, a glossary of more than 500 items, a relatively short bibliography, and a very detailed subject index.

The greatest hurdle faced by any translator of a technical work is, of course, the technical terminology. In the field of law, unlike engineering, for example, the difficulty is compounded by the fact that the technical words of one legal system have no precise synonyms in the vocabulary of another system. Because he has had the non-specialist constantly before him, Pharr has chosen to resolve the difficulty by avoiding Latin terms almost entirely. He has sought for the best English approximation, relying upon ex-

planatory notes to overcome the resulting inexactness. In my judgment, this was an unfortunate decision. Two examples will illustrate the difficulties into which Pharr's decision has led him.

(1) He has chosen to render *divus* by "sainted." The first time the word occurs, in the *Gesta senatus urbis Romae* 4, a footnote gives the Latin word and indicates that "sainted" is but a poor approximation. Thereafter, the English word appears time and again, sometimes with and sometimes without the Latin in the notes, but with no repetition of the explanation. Nor does *divus* or "sainted" appear in the glossary. Obviously few readers will read the volume from cover to cover and none of those will remember each note. The non-specialist who consults an odd passage or title will therefore read "sainted" without qualification of any kind and he will be left with whatever connotation that English word may have for him.

(2) In 2.15.1 pr., we find "not within the time of a usable year," accompanied by the following note: "*annus utilis*, a judicial year; the period of a year, exclusive of holidays, during which cases may be brought in court." Here the note serves to prevent misunderstanding, but the rule of non-Latinity has necessitated a most cumbersome procedure in order to overcome the obvious nonsense of "a usable year."

The simplest and most precise way of handling the large number of comparable words and phrases is to retain the Latin and to reserve the necessary explanation for the glossary. This is, in fact, what has been done in a few instances, such as *colonus*, *inquilinus*, or *laetus*, not to mention such manufactured words as "cretion" or "caducous property." Consistency in this respect would enhance both the accuracy and clarity of the translation and the ease with which the student could use the volume.

Neither the glossary nor the notes follow a sufficiently consistent pattern. Alternative readings and translations, cross-references, dates, brief explanations of administrative terms are all proper part of the apparatus. But the editors have tried to go beyond these essentials to a running commentary. That attempt is ill-advised, I think, and actually a hopeless enterprise. The miscellaneous details that they offer in mass are insufficient, and at times misleading, for the serious non-expert, who must consult reference works and monographs if he wishes to pursue any point

further (in which task the bibliography appended to the volume will be of little help); for the expert, they are a waste of space. Nor are the mechanical aspects of the apparatus properly worked out. Many glossary items merely repeat a perfectly clear text; others duplicate the index; still others attempt to be encyclopedic in miniature. Some important footnotes in the early pages properly belong in a preface: for example, the note on p. 3 indicating the method of citation or the one on p. 11 on the nature of the *Interpretatio*. (The latter is superficial; we have recently learned from Ernst Levy's excellent *West Roman Vulgar Law* how much there is to be gleaned from the *Interpretatio*.)

The index deserves to be singled out for special comment. To my knowledge, it represents an important original contribution. It is very well done, and, added to Gradenwitz's *Heidelberger Index*, it is an invaluable tool for independent research in the Code and appended Novels.

After these relatively lengthy objections to certain formal aspects of the work it is necessary to return to the essential in closing. Every student of legal history will hope that, after the success of this first project, Professor Pharr will find the road to completion of the subsequent volumes easier and much more rapid.

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THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

ACADEMIC YEAR 1951-1952

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October 22, 1951: James O. Murdock, Professor of Law, George Washington University; Joseph Sweeney, Licencié-ès-droit, LL.B.; Edgar W. Turlington, B.C.L. (Oxon): "The Practical Value of the Study of Roman and Civil Law."

Papers read at other Meetings:

December 4, 1951: A. U. Ansari, LL.B., Press Attaché of the Embassy of Pakistan: "Islamic and Roman Law."

April 3, 1952: Dr. Vladimir Gsovski, Chief, Foreign Law Section, Library of Congress: "Roman Law and Soviet Law."

May 22, 1952: Dr. Franklin F. Russell: "The Value of the Study of Roman Law."

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